Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

MIMI MORISSETTE, et al.,

Petitioners,

vs.

DIANE YU, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the State of California's pro hac vice admission rule which disqualifies out-of-state licensed attorneys from the opportunity to appear as pro hac vice counsel solely on the basis of residency is unconstitutional under the Privileges and Immunities Clause, the Commerce Clause, and petitioners' First Amendment rights to petition the Court for redress of grievances and association?

B. Whether an experienced licensed attorney who alleges retaliation in the grading of his California subjective bar exam answers under color of state law in reprisal for championing locally unpopular claims under 42 U.S.C. § 1983, and the attorney prays for admission to the bar of the California Supreme Court and United States District Court for the Central District of California, is required to exhaust his administrative remedy with the California Supreme Court when the state has admitted in writing that they do not have any evidence justifying the attorney's allegedly failing grades.

LIST OF PARTIES

PETITIONERS: MIMI MORISSETTE, PATRICIA MILLER ROSENTHAL, JOSEPH R. GIANNINI, ESQ.

RESPONDENTS: DIANE YU, ISIDORO BERKMAN, CHAIRMAN, THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, TROY B. SMITH, MICHAEL M. BERGFELD, AUDREY B. COLLINS, CRAIG A. DIAMOND, JAMES H. HAYES, JOHN C. HISSERICH, PAUL D. JEFFERSON, JOSEPH R. BERNARD, JULIO MATEO, JR., ROGER L. MEREDIT, KRISIDA J. NISHIOKA, WILMA J. PINDER, DR. ELENA V. RIOS, SYLVIA STERN, PATRICIA M. BILLALOBOS, JEROME BRAUN, ADAM S. FERBER, MALCOLM M. LUCAS, CHIEF JUDGE OF THE CALIFORNIA SUPREME COURT, STANLEY MOSK, EDWARD PANELLI, JOYCE KENNARD, ARMAND ARABIAN, MARVIN BAXTER, RONALD MARC GEORGE

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DECISIONS BELOW

The UNPUBLISHED MEMORANDUM of the United States Court of appeals for the Ninth Circuit is reproduced at Appendix (hereinafter App.) 2-8. The UNPUBLISHED ORDER of the United States District Court for the Central District of California granting Respondents' Motion to Dismiss the First Amended Complaint on a "disfavored" Rule 12(b)(6) motion, denying Petitioners' Motion for Summary Judgement to Invalidate California Rule of Court 983, and denying petitioner GIANNINI'S Motion for Admission to the Bar of the United States District Court for the Central District of California and the California Supreme Court is reproduced at App. 9-25. The UNPUBLISHED ORDER of the United States District Court for the Central District of California granting Respondents' Motion to Dismiss the petitioners' Complaint on a "disfavored" Rule 12(b)(6) motion is reproduced at App. 26-40.

JURISDICTION

The UNPUBLISHED MEMORANDUM of the United States Court of Appeals for the Ninth Circuit was filed on April 11, 1994. Rehearing was timely sought and denied by the Ninth Circuit on May 26, 1994. See App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES AT ISSUE

The constitutionality of California Rule of Court 983 is challenged under the Privileges and Immunities Clause, the Commerce Clause, the First and Fourteenth Amendments. The U.S. District Court jurisdictional statutes at issue are 28 U.S.C. § 1343(a)(3) ("deprivation of privileges and immunities under color of state law") and 28 U.S.C. § 1367 (Supplemental Jurisdiction). Additional

causes of action were also filed under 42 U.S.C. § 1983 and the *Theard* doctrine. These provisions are reproduced at App. 41-46.

STATEMENT OF THE CASE

A. INTRODUCTION

This case is a result of a California judicial cover-up and conspiracy of silence that undermines the integrity of the federal judiciary. This continuing cover-up arose pursuant to a federal judicial gentlemen's agreement that allows the California State Bar to trample the constitutional rights of out-of-state licensed attorneys and the clients that they represent with impunity. In the present action, the subject California federal reviewing courts have concealed or perverted ninety-five percent of the facts and law submitted by the petitioners. Moreover, the reason these "federal" rulings have not been published is to conceal from public scrutiny the benchmark constitutional challenge presented and a ruling contrary to existing law.

The petitioners are Mimi Morissette, Patricia Miller Rosenthal, and Joseph R. Giannini, Esq., a former Philadelphia attorney (hereinafter petitioner attorney) who specializes in federal law. Petitioners Morissette and Rosenthal are non-lawyers. The respondents are Diane Yu, the individual justices of the California Supreme Court, and the individual members of the California State Bar's Committee of Bar Examiners. Diane Yu is presently general counsel for the California State Bar, and she is a former Chairwoman of the California Committee of Bar Examiners. The respondents are sued both in their personal and official capacities.

There are two benchmark issues in this case. First, the petitioners contend that California Rule of Court 983 – on its face and as applied – is unconstitutional under the Privileges and Immunities Clause, the Commerce

Clause, and the petitioners' First Amendment rights to petition the court for redress of grievances and association because California Rule of Court 983 discriminates in *pro hac vice* bar admission solely on the basis of residency.

A majority of this honorable Court has four times in the last nine years, applied a strict scrutiny standard of review, and invalidated general bar admission rules that discriminate solely on the basis of residency. The seminal case *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985) held that an attorney's "opportunity" to practice law is constitutionally protected by the "privileges and immunities Clause". The *Piper* Court applied a strict scrutiny standard of review, and invalidating a New Hampshire Supreme Court bar admission rule that discriminated on the basis of residency. Since *Piper* this Court has routinely rejected all arguments submitted by the states to support discrimination in bar admission on the basis of residency. See *Frazier v. Heebe,* 482 U.S. 641 (1986) (invalidating a Louisiana federal district court admission rule that discriminated on the basis of residency under an "irrational and unnecessary" standard of review); *Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1988) (invalidating Virginia Supreme Court discretionary general bar admission without examination residency requirement); *Barnard v. Thorstenn,* 489 U.S. 546 (1989) (invalidating Virgin Islands Supreme Court bar admission residency requirement).

The gravamen of the petitioners' contention is that if state government cannot discriminate in general bar admission solely on the basis of residency under *Piper, Frazier, Friedman,* and *Barnard,* it follows that California Rule of Court 983 which discriminates in *pro hac vice* bar admission solely on the basis of residency is also unconstitutional. The Ninth Circuit's unpublished ruling did not address the *Piper, Frazier, Friedman,* and *Barnard,* holdings and ratio decidendi; the Privileges and Immunities Clause, the Commerce Clause, and the First Amendment;

or the names or causes of action filed by petitioners Morissette and Rosenthal.

The second benchmark issue presented is whether the California State Bar can deny a licensed attorney certification for general admission to the bar of the California Supreme Court and the United States District Court for the Central District of California on the basis of his having allegedly failed essay tests on a bar exam when the California State Bar has admitted in writing that they do not have any evidence supporting their conclusion. The petitioner attorney alleges that the respondents have refused to certify his admission in reprisal for the petitioner attorney exercising his First Amendment rights, for championing locally unpopular federal claims in a lawsuit and that he has been blacklisted by the respondents as a result of his article published in the Los Angeles Daily Journal titled the LOCAL LAWYER PROTECTION RACKET. This article was published with a cartoon (selected by the Los Angeles Daily Journal) depicting three mirror image judges standing in line scratching each others back with money being secretly exchanged for the California LOCAL LAWYER PROTECTION RACKET. The article also features a subheading "So Far, California Has Managed to Keep Out-of-State Attorneys at Bay, But Across the Nation Barriers to Mobility Are Steadily Crumbling". See App. 54-61 that reproduces this article.

The District Judge in the UNPUBLISHED ORDER correctly stated the standard for dismissal under Rule 12(b)(6) ("it is axiomatac that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. [Cites omitted.]"). See App. 33. However, the District Judge disregarded this standard of review, and held that petitioners' 50 page First Amended Complaint did not state a single federal claim upon which relief could be granted. On appeal, the Ninth Circuit in the UNPUBLISHED MEMORANDUM affirmed on the

ground that all of the petitioners' claims were barred by the doctrine of res judicata.

B. PROCEDURAL HISTORY

The procedural history in this case substantiates petitioners' assertion that there is an ongoing California judicial conspiracy to violate petitioners' constitutional rights and those similarly situated. Initially, this lawsuit was randomly assigned pursuant to the local rules of the Central District. Two months later, and after substantial briefing, however District Judge John G. Davies assigned himself sua sponte to adjudicate this lawsuit. Judge Davies claimed that this lawsuit was "related" to a case that he had been assigned six years earlier. This self assignment is a clear violation of the Central District's local rules that require random case assignment of any case closed over one year.[1]

The petitioners promptly moved for his recusal based solely on the ground that his sua sponte self assignment violated the local rule requiring random case assignment. Judge Davies should have been recused because his sua sponte self assignment is a direct violation of the local rules. See *Martel v. County of Los Angeles* ___ F.2d. ___ (9th Cir. 1994) ("local rules have the force of law", they are "binding upon the parties and the Court that promulgated them" and "where a district court's violation of its local rules affects substantial rights [cites omitted] reversal is required"). See also Wright and Miller, *Federal Practice and Procedure*, § 3152 at 224 (1973) ("a single judge should not have the power to suspend what a majority of

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[1] Central District General Order-C provides:

6.1.1. EXCEPTIONS

A Complaint or petition shall not be considered for transfer as a related case if the lower numbered case has been closed unless:

b. the case has been determined on the merits and been closed for less than one (1) year.

the judges have ruled"). The purpose of random case assignment is to provide a built-in check and balance against the ideological prejudices of a particular judge, or bias of a judge for or against a particular party. The petitioners were denied the fairness and due process that is afforded by random case assignment. Petitioner's had no opportunity for their claims to be considered as a result of the District Judge's violation of the local rule requirement of random case assignment. In this case, the District Judge made it clear to everyone in the courtroom from the first day that he was vehemently opposed to the petitioners.

Additionally, while this case was pending before the District Judge, the District Judge had his picture taken in 1993 standing adjacent to his close friend respondent California Supreme Court Justice Malcolm Lucas. This Central District Judge class photo was published in 1993 by the Los Angeles Daily Journal with a sub caption "who arguably doesn't belong in this picture?" referring to respondent California Supreme Court Justice Malcolm Lucas. Justice Malcolm Lucas was formerly a Central District Judge for fourteen years. The Complaint herein further charges that because of respondent Lucas' close relationship with his former federal judicial colleagues that the California state respondents receive highly unusual, nepotic, and unlawful regard in the federal courts located in California.

Evidence that any dissent in California against the policies and procedures adopted under color of state law by the California State Bar is unwelcome, is shown by the fact that the District Court sanctioned the petitioners $500 for filing a "frivolous" complaint, $2,500 for filing a "frivolous" amended complaint, and $5,000 for filing a "frivolous" and "scandalous" recusal motion under FRCP Rule 11. The petitioners have been sanctioned $8,000 despite the facts that: four United States Supreme court cases

clearly hold that a state cannot discriminate in bar admission on the basis of residency; Rule 983 discriminates in bar admission on the basis of residency; and the constitutionality of Rule 983 has never been previously raised or adjudicated.

The petitioners faced similar "home team" bias on appeal. The petitioners filed a 25 page Rely Brief more than one week before it was due, and an accompanying motion to file this oversized Reply Brief. FRAP provide that Reply Briefs of 25 pages are authorized. The Ninth Circuit rejected the motion and struck the 25 page Reply Brief. The petitioners timely filed a motion for reconsideration submitting that the 25 pages were necessary in view of the national importance of the issues presented, and the monumental fact that the challenged Rule 983 is virtually identical to the local *pro hac vice* admission rules of three out of the four federal district courts sitting in California. One month later this motion for reconsideration was denied. Four days later, the petitioners filed a 15 page Amended Reply Brief. The Ninth Circuit struck this Amended Reply Brief on the pretext that it was late. The Ninth Circuit apparently maintained, although it was never stated, that the time to file the Reply Brief was not tolled during the period the Ninth Circuit considered the motion for reconsideration of the striking of the 25 page Reply Brief. Thereafter, the Ninth Circuit denied the petitioner's motion to file the allegedly late 15 page Amended Reply Brief. The Ninth Circuit then cancelled the oral argument. The Ninth Circuit then denied the petitioners motion that they be allowed to present oral argument. The procedural history in this case on appeal illustrates a consistent denial by the Ninth Circuit of the petitioners' right to due process and an opportunity to be heard, and a remarkable departure from the accepted and usual course of judicial proceedings.

The Ninth Circuit in its Nonpublished Memorandum stated:

"[W]e decided that the facts and legal arguments were adequately presented in the briefs [that were struck] and record, so we ordered that this case, like many we hear be submitted without oral argument." See App. 8.

However, with reference to oral argument Justice William J. Brennan, Jr. has said, "Oral argument is the absolutely indispensable ingredient of appellate advocacy . . . often my whole notion about what a case is about crystallizes at oral argument"[2]. The Ninth Circuit struck the petitioners' Reply Briefs and denied oral argument because their purpose is to provide a judicial cover-up of the issues, facts, and law that the petitioners have submitted.

The Unpublished Memorandum authored by Chief Judge Wallace affirmed the District Court's Unpublished Order. Ninety-five percent of the petitioners' argument that the District Judge should be recused and reversed was omitted from the Unpublished Opinion, the balance was taken entirely out of context.[3] Sanctions were affirmed on appeal. Rather than address the issues relating to the District Judge's conclusion that the petitioners' had failed to state a federal claim in their First Amended Complaint, the Chief Judge in his Unpublished Memorandum claimed that all of the several petitioners'

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[2] Quoted in Harvard Law School Occasional Pamphlet Number Nine 22 (1957).

[3] The Ninth Circuit's UNPUBLISHED MEMORANDUM falsely states Judge Davies' picture with Respondent Lucas was taken in 1983. This UNPUBLISHED MEMORANDUM covers up the primary grounds for recusal that the petitioners submitted. The primary grounds submitted were that the District Judge's self assignment was in direct violation of the local rules, and the evidence indicated that the District Judge's mind was "irretrievably closed" from the outset. This fact was demonstrated by numerous statements the District Judge made in open court, and from his entire refusal to fairly and accurately depict the facts and law the petitioners submitted.

claims were barred by the doctrine of res judicata. This res judicata conclusion is a sham, and illustrates a brazen agenda to disregard federal law because of local prejudices. This conclusion closely parallels Alabama Governor George Wallace's refusal to allow blacks to attend state schools with whites.

C. PRIOR LITIGATION

The petitioner attorney filed a lawsuit in 1987 naming only the California Committee of Bar Examiners as defendants and challenging the constitutionality of the California bar exam that is given to licensed attorneys. The justices of the California Supreme Court were not named as defendants. The petitioner attorney alleged that the exam was unconstitutional in view of evidence the RAND Corporation reported. This evidence proved the essay performance tests given to licensed attorneys were approximately 48% reliable because of substantial differences of reader opinion as to the quality of the answer. These test results are by definition arbitrary because they are less reliable than flipping a coin. The RAND Corporation evidence submitted also proved the entire eight question test (two performance essays and six subject matter essays) given to attorneys licensed elsewhere were approximately 62% reliable. The petitioner attorney submitted evidence that the emperor, the California Committee of Bar Examiners, had no clothes. At this time Diane Yu, also had just been promoted from Chairman of the California Committee of Bar Examiners to Chief Counsel of the California State Bar.

District Judge Davies was randomly assigned the case. He dismissed the Complaint under Rule 12(b)(1) asserting the federal court did not have subject matter jurisdiction. An appeal was taken to the Ninth Circuit. The Ninth Circuit initially ruled a claim had not been stated. The petitioner attorney filed a petition for reconsideration as the per curiam did not address numerous

points of law submitted. Approximately one week later the petitioner learned after reading the Los Angeles Daily Journal that a different Ninth Circuit panel, without knowledge of the prior panel's decision, had entered a conflicting decision in the case *Margulis v. Committee*, 845 F.2d 219 (9th Cir. 1988). *Margulis* held that the licensed attorney must first petition the California Supreme Court for administrative review before the District Court could entertain jurisdiction. Mr. Margulis did not have the RAND evidence that showed the emperor had no clothes, and he did not submit an argument-at-law similar to that submitted by the petitioner attorney. The cases presented were as dissimilar as night and day.

Petitioner attorney realized that the conflict in the Ninth Circuit decisions occurred because Diane Yu's office had intentionally lied to the Ninth Circuit concealing the fact that related appeals filed by licensed attorneys were pending. See App. 51 which reproduces her first assistant's false certification under oath that there were no related pending appeals before the Ninth Circuit in *Giannini v. Committee* when in fact there were. Petitioner attorney immediately notified the assigned Ninth Circuit hearing justices of Diane Yu's felony under federal law, and alleged that this was the "smoking gun" proving knowledge of unlawful conduct perpetrated against out-of-state licensed attorneys by Diane Yu. Under federal law lying under oath to a federal court is a felony.

Justices Wallace and Farris were on the Ninth Circuit hearing panels that were deceived by Yu's felony and obstruction of justice in the prior litigation. Justices Wallace and Farris are also on the Ninth Circuit hearing panel that entered the secret memorandum upon which certiorari is herein requested.

Justices Wallace and Farris covered-up this unlawful conduct because Diane Yu is the general counsel for the

California State Bar, and her unlawful conduct was committed as an agent of the California Supreme Court. These federal judicial officials did not want to disclose the highly embarrassing and conscience shocking RAND Corporation evidence that the petitioner attorney submitted. The myth in California perpetrated by the California State Bar is that the California Committee of Bar Examiners are the superstars of the legal profession. This is the putative reason why two out of three licensed attorneys are regularly failed on these essay tests. These out-of-state licensed attorneys supposedly do not meet California's "high" standards. The RAND Corporation evidence that was submitted shattered this myth. The reason that two out of three attorneys are regularly failed is because the tests are substantially unreliable and do not accurately measure the attorney's level of competence.

The Ninth Circuit in a miscarriage of justice withdrew its initial per curiam opinion, and shoe-horned the fundamentally flawed *Margulis* holding onto *Giannini v. Committee of Bar Examiners,* 847 F.2d 1434 (9th Cir. 1988) (*Giannini* I).

Following the Ninth Circuit's requirement, the petitioner attorney then filed for administrative review with the California Supreme Court. This petition was denied without comment and signed by California Chief Justice Malcolm Lucas. Thereafter, the petitioner attorney filed *Giannini v. Real* in the District Court. This case was merely a continuation of the issues that were raised in *Giannini* I. *Giannini v. Real,* 911 F.2d 354 (9th Cir.) *cert. denied,* 498 U.S. 1012 (1990) (Giannini II) challenged the constitutionality of the California Bar exam given to licensed attorneys and the local "home town" *general* admission rules of the United States District Courts for the Central, Southern, and Eastern Districts of California

which limit admission solely to California licensed attorneys. The District Court absurdly held that these issues were res judicata because the California Supreme Court refused to grant administrative review. At one point, the District Judge stated on the record to the petitioner attorney, "Do me a favor and forget about Diane Yu's perjury". On appeal, the Ninth Circuit held the California exam given to licensed attorneys and the local federal district court *general* admission rules were rational.

The petitioners in this proceeding on which certiorari is requested do not challenge the constitutionality of the California bar exam or the local "home team" *general* bar admission rules of three out of four federal district courts sitting in California. See App. 52-53.

D. RULE 983

This section will examine in turn the petitioners' argument-at-law under the Privileges and Immunities Clause, the Commerce Clause, and the First Amendment, and the District Court's explanation as to why these claims fail to state a claim for relief. This section will next examine the Ninth Circuit's fraudulent misapplication of the doctrine of res judicata.

> California Rule of Court 983 in pertinent part provides: No person is eligible to appear as a counsel *pro hac vice* pursuant to this rule if (1) He is a resident of the State of California, or (2) He is regularly employed in the State of California, or (3) He is regularly engaged in substantial business, professional, or other activities in the State of California.

Under Rule 983 an out-of-state licensed attorney is automatically disqualified from the "opportunity" to appear as *pro hac vice* counsel if the attorney has an office or

residence located in California. Rule 983 by its terms is unconstitutional as it prohibits the state judge from making an "individual determination." See Justice Rehnquist in *Dolan v. City of Tigard*, 108 S.Ct. 2309 (1994) (holding there must be an "essential nexus" between a legitimate state interest and a permit condition [i.e. *pro hac vice* application] and an "individualized determination").

With reference to the petitioners' challenge of Rule 983 under the Privileges and Immunities Clause, and their Motion for Summary Judgement under FRCP 56, the petitioners' submitted that *Supreme Court of New Hampshire v. Piper*, supra, governed their challenge of Rule 983. In *Piper*, 470 U.S. at 281 this honorable Court reasoned:

> "The lawyers role in the national economy is not the only reason that the **opportunity** to practice law should be considered a "**fundamental right.**" We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may – and often do – represent persons who raise unpopular claims. In some cases, representation by non resident counsel may be the only means available for vindication of federal rights. See *Leis v. Flynt*, 439 U.S. at 450 (STEVENS, J., dissenting). The lawyer who champions unpopular causes is . . . important to the maintenance or well-being of the Union. . . . "

The petitioners' argued that this honorable Court's holding that the practice of law should be protected by the "privileges and immunities Clause" is amply demonstrated by the facts in this case. The petitioners argued they have been unable to find California licensed counsel to pursue their "locally unpopular claims" against the State of California. *Id.* The petitioners' argued that this case is being "championed by an out-of-state licensed

[petitioner attorney] lawyer". *Id.* The petitioners argued that they have sought the "vindication of [their] federal rights" by challenging Rule 983. *Id.* The petitioners argued onto deaf ears that the "legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of Privileges and Immunities Clause". *Id.*

The petitioners further asserted that California's *pro hac vice* admission rule is mere "discretionary" limited bar admission without examination. As such, if the Virginia Supreme Court cannot constitutionally deny "discretionary" *general* admission without examination to the bar based on residency in light of this honorable Court's holding in *Friedman,* it necessarily follows the State of California cannot deny "discretionary" limited *pro hac vice* admission without examination based on residency.

The petitioners further submitted that if the Virgin Islands Supreme Court, which is located on an island in the middle of the ocean, cannot discriminate on the basis of residency based on the justification that they do not have the resources to supervise a nationwide bar membership, it is clear that the State of California cannot discriminate in *pro hac vice* bar admission on the basis of residency. See *Barnard v. Thorstenn,* supra, 489 U.S. at 589 ("that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership, is not justification for the [Virgin Islands residency] discrimination imposed here.")

Despite these arguments, the district judge held that the "[petitioners] challenge [to Rule 983] based on the Privileges and Immunities Clause is meritless". See App. 36. The district judge held that *Piper, Friedman,* and *Barnard* are not applicable because the petitioner attorney is a resident of California.

Contrary to the conclusion of the District Court, this honorable Court's decisions in *Piper, Friedman,* and *Barnard* should govern the petitioner's constitutional challenge of Rule 983 for a number of reasons. First, as Justice KENNEDY trenchantly stated in *Friedman,* the Privileges and Immunities Clause is implicated any time "the State has burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency." *Friedman,* 487 U.S. at 69. Rule 983 by its terms discriminates among otherwise equally qualified applicants solely on the basis of residency. Moreover, this honorable Court has made it clear that "the lawyer's role in the national economy is not the only reason the **opportunity** to practice law should be considered a '**fundamental right**' ". *Piper,* 470 U.S. at 281. Rule 983 clearly burdens the lawyer's role in the national economy by eliminating a discrete and substantial class of attorneys from the competitive market. A state also can not violate the fundamental rights of American citizens unless the measure can overcome a strict scrutiny standard of review. The District Court did not apply a strict scrutiny standard of review. The District Court did not even apply a rational basis standard of review. The District Court simply held the petitioners failed to state a federal claim while allegedly employing the most deferential standard of judicial review possible.

Second, the petitioners' challenge of Rule 983 should be governed by *Piper, Friedman,* and *Barnard* because the petitioner attorney, as a licensed member of the bar in good standing, has a constitutionally protected Privilege and Immunity "to champion unpopular claims and vindicate federal rights" not because he is a resident or citizens of any specific state, but because he is a citizen and resident of the United States. The petitioners do not forfeit their fundamental constitutional rights simply

because they cross a state line. The petitioners are American citizens, and they are entitled to all privileges and immunities guaranteed by Article IV Sec. 2 and the Fourteenth Amendment in what ever state they reside.

Third, the petitioners' challenge of Rule 983 should be governed by *Piper, Friedman,* and *Barnard* because these cases recognize that American citizens have a constitutional right to retain out-of-state licensed counsel. "[O]ut-of-state lawyers may – and often do-represent persons who raise unpopular claims". *Piper,* 470 U.S. at 281. Moreover, petitioners Morissette and Rosenthal have First Amendments rights of association and the right to petition the court for redress of grievances. Petitioners Marissette and Rosenthal choose to associate with petitioner attorney, and they choose to have the petitioner attorney petition the state court as *pro hac vice* counsel for the redress of their grievances.

Fourth, this honorable Court has specifically stated in dictum that the location of a lawyers office or residence has nothing what-so-ever to do with bar admission. See *Frazier v. Heebe,* 482 U.S. at 649 ("The location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience"); *Piper* 470 U.S. at 285 ("Nor may we assume that a non resident lawyer – any more than a resident – would disserve his clients by failing to familiarize himself with the rules.").

Rule 983 presents a clear "unconstitutional condition". That is the out-of-state attorney with an office or address in California who desires to apply for *pro hac vice* status, must petition the trial court to waive an unconstitutional disqualifying factor that by the specific terms of Rule 983 cannot be waived. Rule 983 precludes the state court from making an "individual determination". *Dolan v. City of Tigard,* supra, 108 S.Ct. 2309, 2317-2318 (1994).

In the present case, the District Court further held that "the Constitution does not require a state bar to

admit lawyers simply because they have been admitted to another state bar. See *Leis v. Flynt*, 99 S.Ct. 698, 701 (1979)." See App. 36. The District Court's reliance on *Leis v. Flynt*, 439 U.S. 438 (1978) is misplaced. The *Leis v. Flynt* syllabus provides a capsulize of the holding and states:

> "The interest of out-of-state attorneys, who were not admitted to practice law in Ohio, in representing defendants in an Ohio criminal prosecution *held* not to be a cognizable property or liberty interest within the terms of the fourteenth amendment, absent any showing of an independent state- or federal- source for the interest. Hence, the Constitution did not obligate the Ohio courts to accord such attorneys procedural due process on their application for permission to appear *pro hac vice*."

The holding in *Leis* should not control the petitioners' challenge of Rule 983 for several reasons. First, *Leis* was not based on a "privileges and immunities Clause" challenge. *Leis* was decided solely on a due process challenge. The issue decided in *Leis* had nothing what-so-ever to do with residency. Second, the Court in *Leis v. Flynt*, supra, n.4, made it clear that it had not addressed the issue of whether a litigant's right to counsel includes the right to out-of-state counsel. *Leis* did not present a case similar to the case on appeal wherein the petitioners (Morissette and Rosenthal) are individuals who have pressed their First Amendment constitutional rights to: petition the Court for redress of grievances, speech, and association. Third, *Leis* is inapplicable as the legal underpinnings of *Leis* have been undercut because *Leis* was decided prior to this honorable Court's holding in *Piper* and its progeny that eliminate: an attorney's opportunity to practice law is constitutionally protected. The exclusive basis for the due process decision in *Leis*, is that the attorney did not have a constitutionally protected interest, and in *Piper*, *Friedman*, and *Barnard* the high Court HELD that an attorney does have a constitutionally protected interest. The

District Judge entirely ignored and refused to comment on the petitioners' legal argument with respect to *Leis v. Flynt.*

The District Court further concluded that the petitioners challenge to Rule 983 under the Commerce Clause is "equally meritless" See App. 21-22, and should be dismissed under the Rule 12(b)(6) standard. The District Court did not consider the petitioners' argument that Rule 983 is also unconstitutional under the Commerce Clause. Under the Commerce Clause "state statutes that clearly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor other than economic protectionism." *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-274 (1988).

The California respondents have never in any pleading advanced any justification explaining why Rule 983 discriminates in *pro hac vice* bar admission on the basis of residency. The California federal reviewing courts have also not explained the justification for Rule 983's residency based discrimination. This honorable Court in *Piper, Friedman,* and *Bernard* has clearly rejected all justification proffered for discrimination based on residency. As a matter of law, court's "may [not] assume that a non resident lawyer – any more than a resident – would disserve his clients by failing to familiarize himself with the rules." *Piper* 470 U.S. at 285.

There is no bona fide legal reason why an out-of-state licensed attorney with a California office or residence address should be automatically disqualified from *pro hac vice* status other than economic protectionism. The *pro hac vice* attorney is bound by the same rules as every other attorney. The attorney is only appearing *pro hac vice,* and the Court and the California State Bar have direct supervision of the attorney. Thus, the discrimination based on residency inherent in Rule 983 is not justified by a valid factor other than economic protection.

Rule 983 without question has "both the purpose and effect of discriminating in favor" of California licensed attorneys. *Bacchus Imports, Ltd v. Dias,* 486 U.S. 263, 273 (1984). Rule 983's primary purpose and effect is to insulate and protect the economic interests of the local bar. These economic interests are extraordinary. One out of nine Americans live in California. The State of California has the fifth largest gross national product in the world. Rule 983 serves these economic interest by eliminating from the competitive market a discrete and substantial class of qualified attorneys. All out-of-state licensed attorneys who move into or establish an office in California are immediately and automatically barred from appearing as *pro hac vice* counsel. Out-of-state licensed attorneys are deterred from seeking legal employment in California by Rule 983. Rule 983 provides the California State Bar with an "additional tool with which to shore up their competitive position". *West Lynn Creamery Inc. v. Healy,* 114 S.Ct. 2205, 2213 (1994). Rule 983 safeguards California licensed attorneys from having to compete with out-of-state attorneys. Rule 983, in the Petitioners' view, violates the Commerce Clause.

The District Court also disregarded and overlooked the petitioners' claim that Rule 983 is unconstitutional under the First Amendment. Their argument was submitted in their Motion for Summary Judgement and Opposition to the Rule 12(b)(6) dismissal. The District Court ignored the constitutional text and the fact that "the right to assemble peaceably and to petition for redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights". *Mine Workers v. Illinois Bar Assn.,* 389 U.S. 217, 222 (1967). "[E]veryone must agree that the litigant's right to choose his own lawyer in a civil case is a fundamental right." *Richardson-Merrill, Inc. v. Koller,* 472 U.S. 424, 443 (1984) Justice STEVENS in dissent.

As noted above, the Ninth Circuit in its secret unpublished opinion relied on two grounds to affirm the district court. First, the Ninth Circuit held that the petitioners' claims were barred by the doctrine of res judicata as these claims could have been presented in the prior lawsuit *Giannini v. Real,* 911 F.2d 354 (9th Cir. 1990) *cert. denied,* 498 U.S. 1012 (1990)." See App. 6. Second, "an application to challenge is a precondition to standing to challenge the rule." See App. 6.

The res judicata conclusion is misplaced as the state respondents in the District Court admitted that Rule 983 has never been previously raised or adjudicated. The prayer for relief in *Giannini v. Real* in both the district and appellate court is reproduced at App. 46-50. Neither prayer for relief requests that Rule 983 or the California federal district courts' *pro hac vice* admission rules be invalidated. The briefs submitted both at the district court and Ninth Circuit court also did not argue that Rule 983 was unconstitutional. The opinions of the federal reviewing courts in *Giannini v. Real* also did not adjudicate the constitutionality of any *pro hac vice* rule. Further evidence that the res judicata conclusion is without any basis in fact is certified by the fact that the Ninth Circuit unpublished opinion did not even mention the names of petitioners Morissette and Rosenthal. One can search the entire body of the opinion and not find any mention of their names, or comment upon the constitutional challenges to California Rule of Court 983 that they presented.

The Ninth Circuit's conclusion that the petitioners do not have standing to challenge Rule 983 is also flawed because contrary to the Ninth Circuit's Memorandum, the petitioner attorney has twice applied for and been denied *pro hac vice* admission in the California courts. This fact was communicated to the Ninth Circuit in the Reply Briefs that were struck. Both of these applications and denials were submitted after the decision in *Giannini v.*

Real had been argued in the Ninth Circuit. After twice being denied *pro hac vice* admission on the basis of residency it is clear to the petitioner attorney that the probability of persuading a California judge to disregard Rule 983's residency based automatic disqualification is non-existent.

Petitioners Morissette and Rosenthal also have standing as they have been irreparably injured by Rule 983. As a result of 983's blanket disqualification, and the fact that petitioner attorney has applied twice and been denied *pro hac vice* admission on both occasions, petitioners Morissette and Rosenthal were required to settle their state court cases concerning their constitutionally protected property interests at ten cents on the dollar.[4] Additionally, as Justice SOUTER stated in *Farmer v. Brennan*, 114 S.Ct. ___, last term, "one does not have to await the consummation of threatened injury to obtain prevention relief". In this case at bar, the petitioners have already been substantially harmed by Rule 983. Rule 983 continues to deny the petitioners and other Americans access to the California courts.

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[4] Petitioners' only means of obtaining judicial review of the constitutional violation that Rule 983 has already caused them is in this proceeding. The denial of counsel of choice is only appealable by way of final judgment. See *Richardson v. Merrill*, 472 U.S. 424 (holding disqualification of counsel in civil cases not immediately appealable); *Flanagan v. United States*, 465 U.S. 259 (holding disqualification of counsel in criminal cases not immediately appealable).

E. PETITIONER ATTORNEY'S CLAIM FOR GENERAL ADMISSION TO THE BAR OF THE CENTRAL DISTRICT AND THE CALIFORNIA SUPREME COURT

The petitioner attorney is a 1983 graduate of Temple University School of Law, Philadelphia, Pennsylvania. At Temple University, the petitioner attorney was trained by a former Pennsylvania Supreme Court justice, the former Pennsylvania State Attorney General, a Philadelphia federal district court judge, the first assistant Philadelphia United States Attorney, a professor who is presently associate dean at U.C.L.A. Law School, a professor who subsequently became dean at the University of San Diego Law School, and a host of Harvard and Stanford Law School graduates. Petitioner attorney received a first rate legal education.

Petitioner attorney also is an active member in good standing of the bar of the United States Supreme Court, United States Court of Appeals for the Ninth Circuit, United States Tax Court, Pennsylvania Supreme Court, New Jersey Supreme Court, Eastern District of Pennsylvania, District of New Jersey, and the Northern District of California. The petitioner attorney was also practically raised in the Philadelphia United States Courthouse, that offices the Third Circuit and the Eastern District of Pennsylvania. See *Bernicker v. Pratt*, 595 F. Supp. 1034 (E.D.Pa. 1984) in which petitioner attorney was the successful plaintiff's counsel in a lawsuit against Drexel, Burnham, Lambert, and their Wall Street lawyers in a Rule 10(b)(5) tax straddle case adjudicated by Chief Judge Joseph Lord.

After *Giannini v. Real*, supra, was rejected for certiorari, the petitioner attorney applied for the California July 1991 bar exam. The petitioner attorney attended a nationally recognized bar review course, and thoroughly prepared for the exam. Proof that the petitioner attorney thoroughly prepared for the exam is borne out by his test scores on the objective MBE exam that is given nationally.

This exam is scored by the National Conference of Bar Examiners. The petitioner attorney scored in the top twenty-seven percent on the MBE. However, the petitioner attorney's cumulative essay answers were allegedly scored in the bottom ten percent of the grade distribution by the California respondents. The petitioner attorney allegedly failed all eight essay questions[5]. These cumulative bottom ten percent essay scores are the singular reason why the California Committee of Bar Examiners have supposedly not certified the petitioner attorney for admission to the bar of the Central District and the California Supreme Court. "[C]ourts recognize that subjective criteria are ready mechanisms for discrimination". *Antonio v. Wards Cove,* 810 F.2d 1477, 1484 (9th Cir. 1987) (en banc).

The evidence submitted proves that the petitioner attorney has been scored by the Committee in the bottom ten percent without basis in reprisal for his previously championing locally unpopular federal claims. The evidence confirms the petitioner attorney has been blacklisted. The respondents were on notice that the petitioner attorney was taking the California bar exam in July 1991 and that he had previously sued the Committee. The bar applicant must disclose every lawsuit in which he has been a party. Diane Yu and her underlings were fully aware that the petitioner attorney had submitted proof that Diane Yu's office had committed perjury before the Ninth Circuit and that RAND Corporation evidence showed that the subjective tests were less reliable than flipping a coin.

The petitioner attorney in this case has also submitted a handwriting expert witness declaration that was not controverted by the respondents. This declaration opines

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[5] The District Judge falsely stated in his secret opinions that the petitioner attorney failed because he scored in the bottom ten percent on one subjective test.

that *all eight of the allegedly failing grades on the petitioner attorney's essay answers were affixed by the same person.* The customary procedure is for each subjective test to be read and scored by a different reader. If the customary grading procedure had been followed the subjective grades would have been affixed by eight different graders. The petitioner attorney also submitted evidence that based on his objective MBE score, that if his essay tests were scored in the bottom twenty percent of the grade distribution that he would have received a passing grade on the bar exam. And, if the petitioner attorney had been graded in the bottom fifteen percent on the essay tests that he could have been certified for admission, and the exam booklets would have had a second grade as to that reader's opinion as to the quality of the answer.

Most telling of all is the fact that the respondents have admitted in writing that they do not have any evidence supporting their bottom ten percent grades[6]. In *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 (1956) the high Court stated:

> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. [cites omitted] . . . Even in applying permissible standards, officers of a

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[6] State Bar Defendant Jerome Braun, the Senior Executive for Admissions has written petitioner attorney and stated in writing on February 19, 1991:

> "As you say, there are no marks on your answer booklets other than the scores assigned by the readers of the answers. The readers do not make comments about the answers they read on the answer booklets or elsewhere. You received the record of your scores exactly as we received them from the readers and nothing else."

> state cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. [cites omitted]".

In view of *Schware,* the California federal reviewing courts cannot constitutionally exclude the petitioner attorney from the bar of the Central District and the California Supreme Court because the Committee has admitted they do not have any evidence. Justice BLACK joined by Justice DOUGLAS in dissent has stated, "I must repeat once again that consistently with due process of law, applicants for a profession cannot be turned over to the whim of their competitors to determine their right to practice". In *Law Students v. Wadmond,* 401 U.S. 154 (1971).

The petitioner attorney sought review of Diane Yu and the Committee's findings in the federal district court. Jurisdiction was alleged under 28 U.S.C. 1343(a)(3) (deprivation of privileges and immunities under color of state law), 28 U.S.C. § 1367 Supplemental Jurisdiction, and the *Theard* doctrine. The *Theard* doctrine holds that the state and federal bars are distinct and each has authority to individually admit and sanction its members. *Theard v. United States,* 354 U.S. 278 (1957). The petitioner attorney further asserted that the opportunity to petition the California Supreme Court for administrative review is a pretextual artifice that is not available in practice because of institutional bias against attorneys admitted elsewhere. The petitioner attorney further claimed that the justices of the California Supreme Court were foreclosed from reviewing the Committees' findings as they are defendants in the petitioners' challenge to Rule 983, and that in the interests of judicial economy all of these claims should be adjudicated in one proceeding. The petitioners also sought direct federal review because it is locally well known that the California Supreme Court suffers from perhaps the worst calendar gridlock in the United States. Every death penalty conviction in this state is automatically reviewed directly from the trial court by

the California Supreme Court. The California high Court regularly has 200 death penalty cases crowding its docket.

In this case on which certiorari is requested the secret opinions held that the federal court could not decide the petitioner attorney's claim for admission because the petitioner attorney had not exhausted is his administrative remedy with the California Supreme Court. This holding – in addititon to disregarding the allegations of fact, the federal District Court jurisdictional statutes, and the *Theard* doctrine – is also inconsistent with other Ninth Circuit precedent. In *Haddock v. Board of Dental Examiners,* 462 F.2d 462 (9th Cir. 1985), a black male brought a civil rights action against the California Board of Dental Examiners alleging that the board lowered his dental exam examination scores and refused to license him because of his race. The Ninth Circuit held that the Complaint stated a 42 U.S.C. § 1983 claim, and that the Appellant was entitled to prove his claim in the district court without exhausting any alleged administrative remedy.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE CHALLENGE TO RULE 983 RAISES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW, AND THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED TO PROTECT THE INTEGRITY OF THE FEDERAL SYSTEM

The petitioners' challenge of Rule 983 presents an important question of constitutional law. This issue is ripe as the petitioners' have requested summary judgement on this question of law in the District Court and on appeal.

A majority of this honorable Court has clearly outlawed bar admission discrimination on the basis of residency in *Piper, Frazier, Friedman,* and *Barnard.* Yet, the

Ninth Circuit's Unpublished Memorandum sidesteps and fails to comment upon this honorable Court's decisions in these cases by misapplying the doctrine of res judicata. The Ninth Circuit's opinion does not point out where this issue was adjudicated by any federal reviewing court with respect to any of the petitioners. The Ninth Circuit's secret opinion does not refer to Petitioners Morissette and Rosenthal even once. This res judicata conclusion evidences a substantial departure from the accepted and usual course of judicial proceedings, and confirms a judicial cover-up.

This honorable Court should issue certiorari as the Ninth Circuit opinion, in addition to being clearly erroneous, does not put to rest the recurring issue of whether Rule 983 is constitutional. This issue is bound to be promptly raised again in circumstances – that can not be covered-up – that may discredit the integrity of the bench and bar. Three out of the four United States District Courts sitting in California have *pro hac vice* admission rules identical to Rule 983. This honorable Court should issue certioari and put these issues dealing with discrimination by one group of attorneys against another group, and the accompanying allegations of judicial misfeasance that are a black mark on the bench and bar to rest.

Justice CARDOZO has aptly stated, "it will not due to decide the same question one way between one set of litigants and the opposite way between another. *The Nature of the Judicial Process* 33 (1921). As it now stands discrimination in bar admission on the basis of residency is unconstitutional in New Hampshire, Louisiana, Virginia, and the Virgin Islands and every other state – except California. Other federal reviewing courts have adhered to this honorable Court's teaching that residency has nothing to do with bar admission. See *Fuller v. Diesslin*, 868 F.2d 604, 606 (3rd Cir. 1989) ("The distinction between in-state and out-of-state attorneys is a geographical distinction that [makes] little sense in light of the

reality of a highly mobile bar that has at its disposal modern transportation and communication"); *Panzardi v. Alvarez,* 816 F.2d 813 (1st Cir. 1987) (holding the "rote application of a [pro hac vice] rule that leaves no room for the exercise of discretion" violates the defendant's constitutional rights). This honorable Court should issue certiorari and answer the question whether California discrimination in bar admission on the basis of residency is constitutional.

II. CERTIORARI SHOULD BE GRANTED BECAUSE NO EVIDENCE HAS BEEN SUBMITTED THAT INDICATES THE PETITIONER ATTORNEY IS NOT QUALIFIED FOR GENERAL ADMISSION

Justice JACKSON has succinctly stated "progress generally begins in skepticism about accepted truths". *American Communications v. Douds,* 339 U.S. 382, 442-43 (1950). The petitioner attorney has questioned accepted truths propounded by the respondents, and as a result he has been blacklisted for his views.

This honorable Court should grant certiorari because the petitioner attorney has been denied admission under color of state law to the California state and federal bar without a shred of evidence being submitted that indicates the petitioner attorney is not qualified. *Schware* holds that it is unconstitutional to be denied admission without evidence.

CONCLUSION

For all of the foregoing reasons, the petitioners respectfully request that this honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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August 24, 1994

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIMI MORISSETTE, PATRICIA ROSENTHAL, JOSEPH R. GIANNINI, Esq., GERARD A. FIERRO, Esq., et al., Plaintiffs-Appellants, v. DIANE C. YU, The Committee of Bar Examiners of the State Bar of California, ISIDORO BERKMAN, ROBERT M. SWEET, TROY B. SMITH, MICHAEL M. BERGFELD, CALIFORNIA SUPREME COURT, et al., Defendants-Appellees.	No. 93-56288 D.C. No. CV-92-03253-JGD ORDER (Filed May 26, 1994)

Before: WALLACE, Chief Circuit Judge; FARRIS and KLEINFELD, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIMI MORISSETTE, PATRICIA ROSENTHAL, JOSEPH R. GIANNINI, Esq., GERARD A. FIERRO, Esq., et al., Plaintiffs-Appellants, v. DIANE C. YU, The Committee of Bar Examiners of the State Bar of California, ISIDORO BERKMAN, ROBERT M. SWEET, TROY B. SMITH, MICHAEL M. BERGFELD, CALIFORNIA SUPREME COURT, et al., Defendants-Appellees.	No. 93-56288 D.C. No. CV-92-03253-JGD (Filed Apr. 11, 1994) MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Submitted March 8, 1994**
Pasadena, California

Before: WALLACE, Chief Circuit Judge; FARRIS and KLEINFELD, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) & 9th Cir. R. 34-4.

I. Recusal.

Had recusal been required, reversal might be necessary regardless of the merits, so we consider recusal first. We discuss it more extensively than the recusal issue alone requires, because it affects sanctions below and sanctions on appeal.

We review Judge Davies' decision not to recuse himself, and Judge Ideman's denial of the recusal motions, for abuse of discretion. *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870-71 (9th Cir. 1991). We find none. The test is objective: "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Id.*

The grounds urged for recusal originated in Mr. Giannini's dreams.

> During this dream, I observed a thin middle aged lawyer who appeared to be from Beverly Hills wearing a gold tie, having a discussion with a federal judge about the case *Morissette v. Yu*. I could not see the Judge's face because his head was turned down and away from me. The judge and this Beverly Hills lawyer were obviously old and close friends. . . . I was unable to see if money was being exchanged. . . . However, it was perfectly clear to me that it had been agreed that the decision in *Morissette v. Yu* was pre-arranged, the product of their unilateral out of court conversation and friendship, and the decision was not based on the record. . . . It was then that the Judge's face slowly looked up and turned slowly toward the right for the first time, and I clearly observed that the judge was the honorable John G. Davies. . . . Furthermore, it appeared in my apparition that Judge Davies face was slightly distorted, it appeared that he had a dishonest glint in his eye, and the self

> satisfied look of a pig that had just finished eating. (CR 65).

Mr. Giannini explains that after this dream, he maintained an especially high degree of vigilance, interpreting the judge's conduct including "freudian slips" and rulings in light of the dream. CR 65. A reasonable person would not question or characterize Judge Davies' impartiality based on the judge's conduct in a dream about the judge.

The non-dream evidence for recusal consisted of Judge Davies' prior decisions in cases involving Mr. Giannini, and a photograph. The prior decisions do not demonstrate bias from an extrajudicial source, so they cannot support recusal. *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991). The picture was a group photograph in a newspaper of all 27 judges who sat on the United States District Court for the Central District of California in 1983. It includes the Honorable Malcolm Lucas, who has since become the Chief Justice of the California Supreme Court and one of the many defendants in Mr. Giannini's lawsuit. A reasonable person would not question Judge Davies' impartiality based on this photograph.

Mr. Giannini claimed that Judge Davies should not have presided over his case "because he is not a native born American." He also complained that Magistrate Judge King "was born in Shanghai, China and more than likely either went to law school with or is close friends with defendant Diane Yu from the Chinese legal community." A reasonable person would not question Judge Davies' impartiality based on the nationality of the judge,

the magistrate, or one of the defendants. Mr. Giannini offered no evidence to support his conclusory accusation that Judge Davies "actively engaged in a conspiracy to aid and abet a federal judicial cover-up."

II. Dismissal.

We review the 12(b)(6) dismissal de novo. *Buckey v. County of Los Angeles,* 968 F.2d 791, 794 (9th Cir. 1992). While the state is correct that the Eleventh Amendment bars damage claims against the state, the section 1983 claims for injunctive relief against state officials are not barred by the Eleventh Amendment. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 101-02 (1984).

Mr. Giannini has failed the California bar examination three times, and brought several lawsuits. The issue in the case at bar is res judicata. Mr. Giannini failed the California bar exam in July 1986 and February 1987. He sued in federal district court in 1987. His complaint was dismissed, and we affirmed. That decision established that, because only the California Supreme Court and not the Committee of Bar Examiners could grant or deny admission to the bar, there could be no basis for a claim of deprivation of any federal constitutional right until the applicant had petitioned for review of the Committee of Bar Examiners decision in the California Supreme Court. *Giannini v. Committee of Bar Examiners,* 847 F.2d 1434 (9th Cir. 1988) (*Giannini I*).

The case at bar arises out of Mr. Giannini's subsequent failing grade on the July, 1991 bar examination. He does not claim to have petitioned the California Supreme Court. His complaint alleges that he does not wish to

petition the California Supreme Court because he thinks it would be too busy to consider his petition, and he thinks it would be futile because he has not found a petition in a case factually similar to his where the petitioner won. The failure to petition the California Supreme Court bars the claim, under *Giannini I.* His claim of futility does not entitle him to claim a constitutional deprivation without such a petition. *Giannini I,* 847 F.2d at 1435.

Mr. Giannini's general attacks on the constitutionality of the form and content of the California bar examination also have to be dismissed as res judicata, because he made these claims in a prior lawsuit and lost. *Giannini v. Real,* 711 F. Supp. 992, 995 (C.D. Cal. 1989), *aff'd* 911 F.2d 354 (9th Cir.) *cert. denied,* 498 U.S. 1012 (1990) (*Giannini II*).

Mr. Giannini also challenges California Rule of Court 983, precluding his admission pro hac vice because he is a California resident. Res judicata also requires this challenge be dismissed. He previously sued for a declaratory judgment that rules for admission of persons such as himself were unconstitutional, and lost. *Giannini II.* If he had a cause of action, that case arose out of the same cause of action as this one. If his challenge to Rule 983 was not included in that general challenge, it could have been, so it is barred by the judgment in that case. *Clark v. Bear Stearns & Co., Inc.,* 966 F.2d 1318, 1320 (9th Cir. 1992).

Nor does Mr. Giannini claim to have applied for admission under Rule 983. Such an application is a precondition to standing to challenge the rule. *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992).

III. Sanctions.

Judge Davies sanctioned Mr. Giannini $2,000 and Mr. Fierro $500 under Rule 11 for signing a frivolous complaint, having an improper purpose, and making scandalous allegations against various judges and defendants. We review for abuse of discretion. *Conn v. Borjorquez*, 967 F.2d 1418, 1420-21 (9th Cir. 1992). Giannini and Fierro were sanctioned for bringing a frivolous lawsuit, for making scandalous allegations, and for having an improper purpose (to gain bar admission by harassing the defendants). As our review of the facts relating to recusal, and the res judicata bar to litigation of Mr. Giannini's claims on the merits, show, the record amply supported the sanctions. It is indeed scandalous to accuse a judge of a crime, and otherwise impugn the integrity of the judiciary, because one has had a dream about the judge in which the judge appeared to be acting collusively with one's adversary, or has seen a picture in the newspaper of 27 judges in a group photograph of a court, one of whom is a defendant in a case being judged by another, or has the notion that people of another nationality would naturally know each other and collude. Objective reality, not fantasy, dream or delusion, must be the basis for a recusal motion.

VI. Sanctions on appeal

Federal Rule of Appellate Procedure 38 provides that "If a court of appeal shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." We find that this appeal is frivolous. Mr. Giannini has prosecuted this appeal in a

manner magnifying the burden on the court and on his adversaries, by unnecessary motion practice. For example, he filed an overlength reply brief in violation of a specific order of this court. Another judge of this court, not on this panel, struck the overlength brief, and gave him 14 days to file a proper brief. Mr. Giannini did not do what he was ordered to do. Instead, he moved for reconsideration. We denied it. He moved again for an order requiring the clerk to file his late 15-page brief. We denied it. We decided that the facts and legal arguments were adequately presented in the briefs and record, so we ordered that this case, like many we hear, be submitted without oral argument. Mr. Giannini moved for reconsideration and asked leave to argue. We denied it. He was advised that the case would not be orally argued. He came to court anyway, and attempted to present his argument orally, even though his adversary, pursuant to our order, had not appeared. After argument, he filed yet another motion, in form asking for judicial notice, but in substance, attempting to file a supplemental 30-page brief. The burden Mr. Giannini imposes on the court and on defense counsel by his refusal to accept generally applicable limitations exacerbates the harm done by his frivolous appeal.

We have no animus toward Mr. Giannini. Nevertheless, the burden to us and to his adversaries has been considerable. We award the appellees double costs of this appeal, to be taxed against Mr. Giannini in the district court. Fed. R. App. P. 39(e).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIMI MORISSETTE, et al., Plaintiffs, v. DIANE YU, et al., Defendants.	CASE NO. CV 92-3253 JGD ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS, DENYING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND FOR AN ORDER ADMITTING JOSEPH R. GIANNINI, ESQ., TO THE CALIFORNIA STATE AND CENTRAL DISTRICT BARS, AND ORDERING JOSEPH R. GIANNINI, ESQ., AND GERARD A. FIERRO, ESQ., TO SHOW CAUSE RE SANCTIONS (Filed May 26, 1993)

On May 24, 1993, the following matters came on for hearing before the Court:

(1) Motion by Defendants Diane Yu, the Committee of Bar Examiners of the State Bar of California ("Committee"), Isodoro Berkman, Troy B. Smith, Michael M. Bergfeld, Audrey B. Collins, Craig A. Diamond, James H. Hayes, John C. Hisserich, Paul D. Jefferson, Bernard Le Beau, Julio Mateo, Jr., Roger L. Meredith, Krisada J. Nishioka, Wilma J. Pinder, Dr. Elena V. Rios, Sylvia Stern, Patricia Villalobos, Jerome Braun, and Adam S. Ferber

("State Bar Defendants") to Dismiss Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief.

(2) Motion by Defendants California Supreme Court, Malcolm M. Lucas, Stanley Mosk, Edward Panelli, Joyce Kennard, Armand Arabian, Marvin Baxter, and Ronald Marc George ("Supreme Court Defendants") to Dismiss under Federal Rule of Civil Procedure 12(b).

(3) Plaintiffs' Motion for Partial Summary Judgment Holding that California Rule of Court 983 is Unconstitutional.

(4) Plaintiffs' Motion for an Order Admitting Joseph R. Giannini, Esq., to the Bar of the U.S. District Court for the Central District of California and California Supreme Court.

(5) The State Bar Defendants' request for Rule 11 sanctions against Joseph R. Giannini, Esq.

After review of the written submissions and the oral arguments, the Court GRANTS Defendants' motions to dismiss, DENIES Plaintiffs' motions in their entirety, and ORDERS Joseph R. Giannini, Esq., and Gerard A. Fierro, Esq., to show cause why they should not be sanctioned.

Facts

In 1987, Joseph R. Giannini, Esq., ("Giannini") filed a lawsuit in the Central District under 42 U.S.C. § 1983, challenging the constitutionality of the California bar exam and the Committee's refusal to recommend Giannini for admission to the California bar (CV 87-3797-JGD). On August 14, 1987, the Court dismissed Giannini's

complaint for lack of jurisdiction over the subject matter. In *Giannini v. Committee of Bar Examiners of the State Bar of California*, 847 F.2d 1434 (9th Cir. 1988), the Ninth Circuit affirmed the court's order, reasoning that the Court lacked jurisdiction because Giannini had failed to pursue an appeal before the California Supreme Court.

In 1988, Giannini filed a second lawsuit in the Central District under 42 U.S.C. § 1983, challenging the constitutionality of the California bar exam (CV 88-6279-RB) and the Central District Local Rules concerning admission. The court ordered the action stayed until Giannini exhausted his appeal before the California Supreme Court. On October 12, 1988, the California Supreme Court denied Giannini's petition for review.

In *Giannini v. Real*, 711 F. Supp. 992 (C.D. Cal. 1989), Judge Weigel dismissed Giannini's claims. He concluded that the federal courts lacked jurisdiction to review the California Supreme Court's decisions concerning constitutional questions entwined with the facts of a particular bar applicant's situation. *Id.* at 995-96. Moreover, Judge Weigel concluded that Giannini's general; constitutional challenges lacked merit. *Id.* at 997-1000.

In *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990), the Ninth Circuit affirmed Judge Weigel's opinion. The United States Supreme Court denied certiorari in *Giannini v. Real*, 111 S. Ct. 580 (1990).

On May 29, 1992, Plaintiffs filed this action in the Central District. Plaintiffs Mimi Morrisette ("Morrisette") and Patricia Miller Rosenthal ("Rosenthal") are non-lawyers. Plaintiff Giannini is a lawyer admitted to practice in several jurisdictions, but not in California.

Defendants are the California Supreme Court, the California Committee of Bar Examiners, individual members of the Committee and the Bar Association, and the individual members of the California Supreme Court.

Plaintiffs' original complaint states four causes of action arising under 42 U.S.C. § 1983:

Count 1: California Admission Rule 983, which bars California residents from appearing in California courts *pro haec* (sic) *vice,* violates Giannini's right to practice law under Privileges and Immunities Clause, as well as Plaintiffs' rights under the First and Fourteenth Amendments.

Count 2: The Central District bar should admit Giannini, a qualified lawyer who is not admitted to the California Bar.

Count 3: The Committee's failure to certify Giannini for admission to the California Bar after the July 1991 bar exam is arbitrary and capricious.

Count 4: Because Morrisette and Rosenthal have been deprived Giannini's legal services, they have been denied their right to association under the First Amendment and their right to counsel under the Sixth Amendment. Only the Supreme Court Defendants are named as Defendants in Count 1. Only the State Bar Defendants are named as Defendants in Count 2 and 3. Count 4 is brought against all Defendants.

Plaintiffs seek orders declaring that Rule 983 is unconstitutional and that Morrisette and Rosenthal's constitutional rights have been violated. In addition, they seek an order admitting Giannini to the California and Central District bars.

Plaintiffs' original complaint alleges the following facts. Giannini is a member of the bar of several other states and courts. He studied diligently for the July 1991 California bar exam. Although he scored in the top 27% of the examinees on the objective Multistate portion of the exam, he placed among the bottom 10% on one of the essays. Because the essays are graded in an arbitrary and capricious way, Giannini failed the exam. Since Giannini cannot practice law in California, Morrisette and Rosenthal have been unable to use his legal services. Giannini's present inability to practice law in California is due to the fact that he has been blacklisted by Defendants and is the victim of what he describes as a "federal judicial coverup."

On June 11, 1992, Plaintiffs filed their motion seeking an order admitting Giannini to the California and Central District bars. On July 6, 1992, the State Bar Defendants filed their motion to dismiss Plaintiffs' complaint. On July 9, 1992, the Supreme Court Defendants filed their motion to dismiss.

On November 2, 1992, the parties' motions came on for hearing. During the hearing, the Court granted Defendants' Rule 12(b)(1) and 12(b)(6) motions to dismiss and denied Plaintiffs' motion to admit. Finally, the Court ordered Giannini to show cause why he should not be sanctioned. The Court filed its order concerning these matters on November 18, 1992. See Order Granting Defendants' Motions to Dismiss, Denying Plaintiffs' Motion for an Order Admitting Joseph R. Giannini, Esq., to the California State and Central District Bars, and ordering Joseph R. Giannini, Esq., to Show Cause re: Rule 11 Sanctions.

On November 10, 1992, Plaintiffs filed their motion for partial summary judgment. On November 16, 1992, Plaintiffs filed their motion to compel discovery. On November 23, 1992, Giannini filed his response to the Court's O.S.C. re Rule 11 sanctions. On the same date, Plaintiffs filed their motion to vacate and for leave to amend. On November 30, 1992, Plaintiffs lodged a second motion to vacate together with a motion to admit Giannini to the State and Central District bars.

On December 14, 1992, these motions came on for hearing. During the hearing, the Court denied Plaintiffs' motions in their entirety. The Court filed its order concerning these matters on January 20, 1993.

On December 28, 1992, Plaintiffs filed their motion to vacate and for reconsideration of the Court's order filed November 18, 1992. On the same date, Plaintiffs lodged their First Amended Complaint. The First Amended Complaint incorporates the original complaint and adds four additional causes of action under 42 U.S.C. § 1983:

Count 5: Defendants have retaliated against Giannini exercising his First Amendment rights in criticizing Defendants.

Count 6: California Admission Rule 983 violates Morissette and Rosenthal's rights to Giannini's legal services under the First Amendment.

Count 7: California Admission Rule 983 violates Morissette and Rosenthal's rights to Giannini's legal services under the Sixth Amendment.

Count 8: California Admission Rule 983 violates Plaintiffs' rights under the Commerce Clause.

Count 5 is brought against all Defendants. Only the Supreme Court Defendants are named as Defendants in Counts 6, 7, and 8. On February 8, 1993, the Court filed an order granting Plaintiffs' leave to file the First Amended Complaint.

On February 11, 1993, the Supreme Court Defendants filed their motion to dismiss the First Amended Complain. On February 12, 1993, the State Bar Defendants filed their motion to dismiss the First Amended Complaint. On March 8, 1993, Plaintiffs' filed their motion for partial summary judgment. On March 16, 1993, Plaintiffs filed their motion for an order admitting Giannini to the California and Central District bars.

Discussion

Defendants' Position: Motions to Dismiss

Defendants raise essentially the same arguments against the first four counts of the First Amended Complaint that they raised against the identical causes of action in the original complaint. As to the remaining counts of the First Amended Complaint, Defendants contend that they suffer from the fatal defects afflicting the first four counts, as well as new defects.

First, the Eleventh Amendment bars Plaintiffs' suit against the California Supreme Court.

Second, Giannini has failed to appeal the Committee's decision concerning his July 1991 exam to the California Supreme Court. *See Giannini v. Committee of Bar*

Examiners of the State Bar of California, 847 F.2d 1434, 1435 (9th Cir. 1988).

Third, many of Plaintiffs' claims are barred by the doctrines of res judicata and collateral estoppel.

Fourth, the Court lacks jurisdiction to hear particularized constitutional challenges to Defendants' admission policies.

Fifth, Plaintiffs' remaining generalized constitutional challenges to California Admission Rule 983 are meritless.

Sixth, because Giannini has not applied for pro haec (sic) vice status, Plaintiffs' claims to not present a case or controversy.

Plaintiffs' Position: Motions to Dismiss

In response to Defendants' first argument, Plaintiffs contend that the Eleventh Amendment has not prevented the United States Supreme Court from ruling in several cases that bar admissions procedures are unconstitutional.

In response to the Defendants' second argument, Plaintiffs contend that appeal to the California Supreme Court is futile because the California Supreme Court never reverses the Committee's admissions recommendations. In addition, the holding in *Giannini v. Committee of Bar Examiners of the State Bar of California,* 847 F.2d 1434, 1435 (9th Cir. 1988), is "bad law."

In response to Defendants' third argument, Plaintiffs contend that the Court should admit Giannini to the Central District bar because Defendants have blacklisted Giannini.

In response to Defendants' fourth argument, the Court has jurisdiction to hear Plaintiffs' claims under the holding in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976).

Finally, in response to Defendants' fifth argument, Plaintiffs contend that recent United States Supreme Court holdings imply that under the Privileges and Immunities Clause, residency cannot be used as a basis for denying lawyers the right to practice. Accordingly, Plaintiffs assert that California Admissions Rule 983 is unconstitutional under the Privileges and Immunities Clause. In addition, Rule 983 violates the Commerce Clause, and chills Plaintiffs' First and Sixth Amendment rights.

Plaintiffs' Position: Motions for Partial Summary Judgment and for an Order Admitting Giannini to the California and Central District Bars

Plaintiffs argue that partial summary judgment in their favor is appropriate because California Rule of Court 983 violates the Privileges and Immunities Clause, the Commerce Clause, the First Amendment, and the Sixth Amendment. Moreover, because the Court has jurisdiction to hear generalized challenges to Rule 983, it has the jurisdiction to order Giannini's admission to the California and Central District bars.

Defendants, Position: Motions for Partial Summary Judgment and for an Order Admitting Giannini to the California and Central District Bars

Defendants respond that the Court should deny partial summary judgment because Plaintiffs' constitutional claims are meritless. Accordingly, Plaintiffs have no basis

in law or equity for an order admitting Giannini to the California and Central District bars.

State Bar Defendants' Position: Rule 11 Sanctions

The State Bar Defendants contend that Giannini should be sanctioned because he filed the First Amended Complaint to harass Defendants. The First Amended Complaint is a thinly supplemented version of the original complaint that restates the original four counts and adds four equally defective claims.

A. 12(b)(1) and 12(b)(6) Motions to Dismiss

1. Standards

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction may be made on the basis that the complaint fails to allege grounds for federal subject matter jurisdiction as required by Federal Rule of Civil Procedure 8(a), that is, lack of subject matter jurisdiction appears from the "face of the complaint." *Thornhill Publishing Co. v. General Telephone & Electronics*, 594 F.2d 730, 733 (9th Cir. 1979).

The Ninth Circuit position on motions to dismiss pursuant to Rule 12(b)(6) is as follows:

> 'A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 4546, 78

> S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.

Hall v. City of Santa Barbara, 813 F.2d 198, 201, n.9 (9th Cir. 1986), *cert. denied,* 108 S. Ct. 1120.

Furthermore, "it is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Id.*

2. Counts 1 Through 4

In the Court's order filed on November 18, 1992, the Court has analyzed these claims at length and concluded that they (sic) meritless. The Court reaffirmed this conclusion in denying Plaintiffs, motions to vacate in the Court's order filed on January 20, 1993. Accordingly, Counts 1 through 4 are properly dismissed.

3. Counts 5 Through 8

a. Count 5

Count 5 alleges that Defendants have improperly denied Giannini admission to the California bar because he exercised his First Amendment rights by criticizing Defendants. Accordingly, Count 5 raises a constitutional claim that requires the Court to investigate the particular circumstances surrounding Defendants' treatment of Giannini's July 1991 bar exam.

As explained in the Court's previous orders, the Court lacks jurisdiction to hear this sort of particularized constitutional challenge:

> District courts lack subject matter jurisdiction over particularized challenges to recommendations of the Committee before they have been reviewed by the California Supreme Court. *Giannini v. Committee of Bar Examiners of the State Bar of California,* 847 F.2d 1434, 1435 (9th Cir. 1988); *Margulis v. State Bar of California,* 845 F.2d 215, 216-27 (9th Cir. 1988). In the present case, Giannini acknowledges that he has not petitioned the California Supreme Court for review of the Committee's recommendation denying Giannini admission to the state bar.
>
> Moreover, even if Giannini were to petition the California Supreme Court and obtain no relief, the Court would lack subject matter jurisdiction over Giannini's particularized claims. Although federal district courts have subject matter jurisdiction over general constitutional challenges to admissions policies, they may not review a final state court ruling in a particular case. 711 F. Supp. at 996 (citing *District of Columbia Court of Appeals v. Feldman,* 103 S. Ct. 1303, 1317 (1983)). Only the United States Supreme Court may review final judgments of a state court concerning particular applications for admission to the state bar. *See Feldman,* 103 S. Ct. at 1315-17.

Order filed January 20, 1993, 9:10-10:4.

b. Count 6

Count 6 alleges that Rule 983 violates Plaintiffs' First Amendment rights because it prevents Morissette and Rosenthal from retaining Giannini as their legal counsel, thereby denying them their rights of association and to redress their grievances before the courts. Plaintiffs also argue that Rule 983 functions as a prior restraint on Plaintiffs' speech.

Plaintiffs cite some case law concerning their First Amendment claims. However, none of the cited cases remotely support the proposition that Morissette and Rosenthal have a First Amendment right to Giannini's legal services, or the proposition that Giannini has a First Amendment right to practice law in California.

c. Count 7

Count 7 alleges that Rule 983 infringes Plaintiffs' Sixth Amendment right to counsel. However, the Supreme Court has stated that the Sixth Amendment does not entitle parties to the legal services of lawyers who are not members of the bar. *See Wheat v. United States,* 108 S. Ct. 1692, 1697 (1988).

d. Count 8

Count 8 alleges that Rule 983 violates the Commerce Clause. When a form of discrimination falls within the scope of Privileges and Immunities Clause and the Commerce Clause, the Clauses imply essentially equivalent standards for determining whether the discrimination is

constitutionally permissible. *Giannini v. Real*, 911 F.2d 354, 358 (9th Cir. 1992). In its previous orders, the Court concluded that Plaintiffs' constitutional challenges to Rule 983 under the Privileges and Immunities Clause were meritless. Accordingly, Count 8 is equally meritless under the Commerce Clause.

3. Conclusion

The Court may properly dismiss a previously amended complaint when further amendments would be futile. *See Allen v. City of Beverly Hills*, 911 F.2d 367, 373-74 (9th Cir. 1990). It is evident that Plaintiffs are unable to state a meritorious constitutional challenge concerning Giannini's July 1991 bar results that the Court has jurisdiction to hear. Accordingly, Plaintiffs' First Amended Complaint is properly dismissed in its entirety without leave to amend.

B. Remaining Motions

In view of the conclusion stated *supra*, Plaintiffs' motions for partial summary judgment and for a order admitting Giannini to the California and Central District bars are properly denied.

C. Sanctions

Rule 11 provides:

> A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of an attorney or party constitutes a

> certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The Court has considerable discretion in determining the appropriate sanction for a Rule 11 violation. W. Schwarzer, A. Tashima & J. Wagstaffe, Federal Civil Procedure Before Trial § 17:40 (1993). The Court may impose sanctions upon its own initiative. *Id.* at § 17:109.

In addition, the Court has the power to impose an award of attorneys' fees on lawyers for "bad faith" conduct in litigation under 28 U.S.C. § 1927 and under its inherent authority. W. Schwarzer, A. Tashima & J. Wagstaffe, Federal Civil Procedure Before Trial §§ 17:144-51.1 & 17:159 (1993). The Court may impose sanctions sua sponte under Section 1927, *see Braley v. Campbell*, 832 F.2d 1504, 1515 (10th Cir. 1987), and under its inherent power, W. Schwarzer, A. Tashima & J. Wagstaffe, Federal Civil Procedure Before Trial §§ 17:170 (1993).

In the present case, it is evident that Giannini and Gerard A. Fierro ("Fierro"), Esq., who is counsel for Morrisette and Rosenthal, signed their names to Plaintiffs' First Amended Complaint fully aware that the first four counts were fatally deficient. Moreover, they were aware that in the Court's order filed on January 20, 1993, the Court had concluded that the claims presented in the last four counts were equally deficient. *See* order filed January 20, 1993, 12:4-14:25. These considerations are a sufficient basis for Rule 11 sanctions. *See Orange Production Credit Ass'n v. Frontline Ventures Ltd.*, 792 F.2d 797, 801 (9th Cir. 1986).

Moreover, Giannini's many filings are replete with abusive and vexatious language directed at Defendants and the Court. This fact, together with Giannini's determination to pursue patently defective arguments, supports the conclusion that Giannini brought this suit solely for an improper purpose, namely, to harass Defendants into granting him admission to the bar.

Accordingly, Giannini and Fierro are ordered to show cause why they should not be sanctioned under Rule 11, Section 1927, or the Court's inherent power.

Conclusion

For the reasons cited above, the Court hereby GRANTS Defendants' motions to dismiss and DENIES Plaintiffs' motions for partial summary judgment and to admit. Plaintiffs' First Amended Complaint is DISMISSED WITHOUT LEAVE TO AMEND. Joseph R. Giannini, Esq., and Gerard A. Fierro, Esq., must show cause on or before June 7, 1993, why they should not be subject

to sanctions. The hearing on said O.S.C. is hereby set upon the Court's calendar on June 21, 1993, at 1:30 PM in Courtroom 890.

IT IS SO ORDERED.

Dated: May 25, 1993

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIMI MORISSETTE, et al., Plaintiffs, v. DIANE YU, et al., Defendants.	CASE NO. CV 92-3253 JGD ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS, DENYING PLAINTIFFS' MOTION FOR AN ORDER ADMITTING JOSEPH R. GIANNINI, ESQ., TO THE CALIFORNIA STATE AND CENTRAL DISTRICT BARS, AND ORDERING JOSEPH R. GIANNINI, ESQ., TO SHOW CAUSE RE: RULE 11 SANCTIONS (Filed Nov. 16, 1992)

On November 2, 1992, the following matters came on for hearing before the Court:

(1) Motion by Defendants Diane Yu, The Committee of Bar Examiners of the State Bar of California ("Committee"), Isodoro Berkman, Troy B. Smith, Michael M. Bergfeld, Audrey B. Collins, Craig A. Diamond, James H. Hayes, John C. Hisserich, Paul D. Jefferson, Bernard Le Beau, Julio Mateo, Jr., Roger L. Meredith, Krisada J. Nishioka, Wilma J. Pinder, Dr. Elena V. Rios, Sylvia Stern,

Patricia Billalobos, Jerome Braun, and Adam S. Ferber ("State Bar Defendants") to Dismiss under Federal Rule of Civil Procedure 12(b).

(2) Motion by Defendants California Supreme Court, Malcolm M. Lucas, Stanley Mosk, Edward Panelli, Joyce Kennard, Armand Arabian, Marvin Baxter, and Ronald Marc George ("Supreme Court Defendants") to Dismiss under Federal Rule of Civil Procedure 12(b).

(3) Plaintiffs' Motion for an Order Admitting Joseph R. Giannini, Esq., to the Bar of the U.S. District Court for the Central District of California and California Supreme Court.

(4) The State Bar Defendants' request for Rule 11 sanctions against Joseph R. Giannini, Esq.

After review of the written submissions and the oral arguments, the Court GRANTS the State Bar Defendants' and the Supreme Court Defendants' motions to dismiss, DENIES Plaintiffs' motions for an order to admit, and ORDERS Joseph R. Giannini, Esq., to show cause why he should not be sanctioned under Rule 11.

Facts

Joseph R. Giannini, Esq., ("Giannini") is a lawyer who is an active member of several bar associations, including the Bars of the Pennsylvania and New Jersey Supreme Courts, but has thus far failed to pass the California bar exam. In 1987, Giannini filed a lawsuit in the Central District under 42 U.S.C. § 1983, challenging the constitutionality of the California bar exam and the Committee's refusal to recommend Giannini for admission to

the California bar (CV 87-3797-JGD). On August 14, 1987, the Court dismissed Giannini's complaint for lack of jurisdiction over the subject matter. In *Giannini v. Committee of Bar Examiners of the State Bar of California*, 847 F.2d 1434 (9th Cir. 1988), the Ninth Circuit affirmed the Court's order, reasoning that the Court lacked jurisdiction because Giannini had failed to pursue an appeal before the California Supreme Court.

In 1988, Giannini filed a second lawsuit in the Central District under 42 U.S.C. § 1983, challenging the constitutionality of the California bar exam and the Central District Local Rules concerning admission (CV 88-6279-RB). The court ordered the action stayed until Giannini exhausted his appeal before the California Supreme Court. On October 12, 1988, the California Supreme Court denied Giannini's petition for review.

In *Giannini v. Real*, 711 F. Supp. 992 (C.D. Cal. 1989), Judge Weigel dismissed Giannini's claims. He concluded that the federal courts lacked jurisdiction to review the California Supreme Court's decisions concerning constitutional questions entwined with the facts of a particular bar applicant's situation. *Id.* at 995-96. Moreover, Judge Weigel concluded that Giannini's general constitutional challenges lacked merit. *Id.* at 997-1000.

In *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990), the Ninth Circuit affirmed Judge Weigel's opinion. The United States Supreme Court denied certiorari in *Giannini v. Real*, 111 S. Ct. 580 (1990).

On May 29, 1992, Plaintiffs Mimi Morrisette ("Morrisette"), Patricia Miller Rosenthal ("Rosenthal"), and Giannini filed this action in the Central District. Plaintiffs

Mimi Morrisette ("Morrisette") and Patricia Miller Rosenthal ("Rosenthal") are nonlawyers. Defendants are the California Supreme Court, the Committee, individual members of the Committee and the Bar Association, and the individual members of the California Supreme Court.

Plaintiffs' complaint states four causes of action arising under 42 U.S.C. § 1983:

Count 1: California Admission Rule 983, which bars California residents from appearing in California courts *pro haec* (sic) *vice*, violates Giannini's right to practice law under Privileges and Immunities Clause, as well as Plaintiffs' rights under the First and Fourteenth Amendments.

Count 2: The Central District bar should admit Giannini, a qualified lawyer who is not admitted to the California bar.

Count 3: The Committee's failure to certify Giannini for admission to the California bar after the July 1991 bar exam is arbitrary, capricious, and vindictive.

Count 4: Because Morrisette and Rosenthal have been deprived Giannini's legal services, they have been denied their right to association under the First Amendment and their right to counsel under the Sixth Amendment.

Plaintiffs seek orders declaring that Rule 983 is unconstitutional and that Morrisette and Rosenthal's constitutional rights have been violated. In addition, they seek an order admitting Giannini to the California and Central District bars.

Plaintiffs' complaint alleges the following facts. Giannini is a member of the bar of several other states and

courts. He studied diligently for the July 1991 California bar exam. Although he scored in the top 27% of the examinees on the objective Multistate portion of the exam, he placed among the bottom 10% on one of the essays. Because the essays are graded in an arbitrary, capricious, and vindictive way, Giannini failed the exam. Since Giannini cannot practice law in California, Morrisette and Rosenthal have been unable to sue his legal services.

On June 11, 1992, Plaintiffs filed their motion seeking an order admitting Giannini to the California and Central District bars. On July 6, 1992, the State Bar Defendants filed their motion to dismiss Plaintiffs' complaint. On July 9, 1992, the Supreme Court Defendants filed their motion to dismiss.

Discussion

Plaintiffs argue that the Court should order the California and Central District bars to admit Giannini because the right to practice law is a privilege protected by the Privileges and Immunities Clause. Defendants have deprived Giannini of this right by allowing his exam to be graded in an arbitrary, capricious, and vindictive manner.

Plaintiffs also argue that the Court has the discretion to admit Giannini to the Central District bar, regardless of the fact that he is not a member of the California bar. Plaintiffs contend that Giannini is a well qualified lawyer.

Defendants argue that because only the California Supreme Court has the authority to admit applicants to

the California bar, the Court lacks the authority to order Giannini's admission to the bar. Defendants argue that if Plaintiffs' motion is framed as a motion for a preliminary injunction, Plaintiffs have failed to show either a combination of probably success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

Defendants argue that Plaintiffs' complaint should be dismissed under Rule 12(b)(1) and 12(b)(6) following reasons:

First, the Eleventh Amendment bars Plaintiffs' suit against the California Supreme Court.

Second, Giannini has failed to appeal the Committee's decision concerning his July 1991 exam to the California Supreme Court.

Third, any claim that the Local Rules are unconstitutional because they restrict membership in the Central District bar to members of the California bar is res judicata. *See Giannini v. Real,* 911 F.2d at 361.

Fourth, Plaintiffs' remaining generalized constitutional challenges to California bar's admission policies are meritless.

In response to Defendants' first argument, Plaintiffs contend that the Eleventh Amendment has not prevented the United States Supreme Court from ruling in several cases that bar admissions procedures are unconstitutional.

In response to the Defendants' second argument, Plaintiffs contend that appeal to the California Supreme

Court is futile because the California Supreme Court never reverses the Committee's admissions recommendations. Plaintiffs assert that the Court has the authority to review the Committee's decision *de novo.*

In response to Defendants' third argument, Plaintiffs contend that the Court should admit Giannini to the Central District bar because Defendants have blacklisted Giannini.

Finally, in response to Defendants' fourth argument, Plaintiffs contend that recent United States Supreme Court holdings imply that under the Privileges and Immunities Clause, residency cannot be used as a basis for denying lawyers the right to practice. Accordingly, Plaintiffs assert that California Admissions Rule 983 is unconstitutional.

A. 12(b)(1) and 12(b)(6) Motions to Dismiss

1. Standards

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction may be made on the basis that the complaint fails to allege grounds for federal subject matter jurisdiction as required by Federal Rule of Civil Procedure 8(a), that is, lack of subject matter jurisdiction appears from the "face of the complaint." *Thornhill Publishing Co. v. General Telephone & Electronics,* 594 F.2d 730, 733 (9th Cir. 1979).

The Ninth Circuit position on motions to dismiss pursuant to Rule 12(b)(6) is as follows:

> 'A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.

Hall v. City of Santa Barbara, 813 S. Ct. 198, 201, n.9 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 1120. Furthermore, "it is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Id.*

2. Eleventh Amendment Immunity

The Supreme Court Defendants argue that the Eleventh Amendment shields them from Plaintiffs' suit. The Eleventh Amendment bars federal courts from hearing suits against the states. *Giannini v. Real*, 711 F. Supp. 992, 996 (C.D. Cal. 1989) (citing *Pennhurst States School & Hospital v. Halderman*, 104 S. Ct. 900 906-07 (1984)). Although it bars suits against the Committee and the California Supreme Court, it does not shield the members of these bodies from being sued in their personal capacities. *Id.* Thus, Plaintiffs' suit is properly dismissed against the Committee and the California Supreme Court, but not against the members of the Committee, the State Bar Association, and the California Supreme Court who are named individually as defendants.

3. Constitutionality of Bar Admissions Decisions

Plaintiffs may bring two kinds of challenges concerning bar admissions. They may challenge the constitutionality of a general procedure, or the constitutionality of a procedure as it has been applied in particular to them. *Giannini v. Real,* 711 F. Supp. 992, 995 (C.D. Cal. 1989) (citing *District Court of Appeals v. Feldman,* 103 S. Ct. 1303, 1316 (1983)). District courts lack subject matter jurisdiction over particularized challenges to recommendations of the Committee before they have been reviewed by the California Supreme Court. *Giannini v. Committee of Bar Examiners of the State Bar of California,* 847 F.2d 1434, 1435 (9th Cir. 1988); *Margulis v. State Bar of California,* 845 F.2d 215, 216-27 (9th Cir. 1988). Although federal district courts have subject matter jurisdiction over general constitutional challenges to admissions policies, they may not review a final state court ruling in a particular case. 711 F. Supp. at 996 (citing *Feldman,* 103 S. Ct. at 1317).

a. Particularized Constitutional Review

In the present case, Counts 2 and 3 of Plaintiffs' Complaint requires the Court to engage in a particularized constitutional review of the grading of Giannini's July 1991 exam. However, Giannini acknowledges that he has not appealed the Committee's decision to the California Supreme Court. For this reason, the Court lacks subject matter jurisdiction over the particularized constitutional claims raised in Count 2 and 3. Moreover, because district courts lack subject matter jurisdiction to review the California Supreme Court's disposition of

petitions, the Court will never have jurisdiction to hear Giannini's particularized claims. Only the United States Supreme Court may review final judgments of a state court concerning particular applications for admission to the state bar. *See Feldman,* 103 S. Ct. at 1315-17.

Giannini argues that petitioning the California Supreme Court is futile. However, in *Giannini v. Committee of Bar Examiners of the State Bar of California,* 847 F.2d 1434, 1435 (9th Cir. 1988), the Ninth Circuit held that a petition is required even though it may be futile.

Thus, Counts 2 and 3 are properly dismissed insofar as they require a particularized constitutional inquiry.

b. General Constitutional Challenges

Because Counts 1 through 4 raise general constitutional issues, the Court has subject matter jurisdiction concerning them. Accordingly, it is necessary to assess the merits of the claims they raise.

i. Count 1

Plaintiffs contend that California Admission Rule 983, which bars California residents from appearing in court *pro haec* (sic) *vice,* violates Giannini's right to practice law under Privileges and Immunities Clause, as well as Morissette and Rosenthal's First and Fourteenth Amendment rights.

To show that the Privileges and Immunities Clause bars the use of residency to deny a lawyer the privilege of practicing, Plaintiffs cite three cases: *Supreme Court of*

New Hampshire v. Piper, 105 S. Ct. 1272 (1985), *Supreme Court of Virginia v. Friedman,* 108 S. Ct. 2260 (1988), and *Barnard v. Thorstenn,* 109 S. Ct. 1294 (1989). However, in all three cases, the Court held that states could not require some form of residency as a qualification for admission to the bar. The Court did not address whether the Privileges and Immunities Clause permitted states to accord nonresident lawyers limited privileges to practice law that it denied residents.

The better view is that these cases do not imply that the Privileges and Immunities Clause bars states from granting nonresident lawyers limited privileges denied to residents. In *Barnard,* the Court expressly affirmed that the Clause prevents discrimination against nonresidents. *See* 109 S. Ct. at 1299. Plaintiffs do not cite any cases in which the Clause has been held to prevent discrimination in favor of nonresident lawyers. Moreover, in other contexts, the Court has concluded that the Constitution does not require a state bar to admit lawyers simply because they have been admitted to another state bar. *See Leis v. Flynt,* 99 S. Ct. 698, 701 (1979). For this reason, Plaintiffs' challenge based on the Privileges and Immunities Clause is meritless.

Plaintiffs also contend in a conclusory fashion that Rule 983 deprives Plaintiffs' rights to due process and free speech. However, Plaintiffs' due process claims are res judicata. *See* 911 F.2d at 356-58. Moreover, Plaintiffs fail to supply any case support for their First Amendment claims.

In sum, Count 1 is properly dismissed.

ii. Count 2

Insofar as Plaintiffs' challenge to the Local Rules is a generalized constitutional challenge, it is res judicata. *See* 711 F. Supp. at 999-1000. Thus, Count 2 is properly dismissed insofar as it raises generalized constitutional challenges.

iii. Count 3

Insofar as Plaintiffs' challenge to the Committee's testing procedures are based on generalized constitutional concerns about reliability, it is res judicata. *See* 911 F.2d at 358. In sum, Count 3 is properly dismissed insofar as it raises generalized constitutional challenges.

iv. Count 4

Morissette and Rosenthal contend that because Giannini has been denied admission to the bar, they have been denied their rights to counsel under the Sixth Amendment and their rights of association under the First Amendment.

Both Morissette and Rosenthal seek Giannini's services in civil matters. However, the Sixth Amendment guarantees assistance of counsel only in criminal matters. Thus, this challenge is meritless.

Neither Morissette nor Rosenthal cite any case law supporting the contention that they have a First Amendment right to legal services. This challenge is also meritless.

In sum, Count 4 is properly dismissed.

c. Summary

Because the Court lacks jurisdiction over the subject matter to review the particular circumstances surrounding Giannini's July 1991 exam, and because Plaintiffs' remaining constitutional challenges are meritless, Defendants' motions to dismiss under Rule 12(b) are hereby granted.

C. Motion to Admit

Since Plaintiffs have failed to provide any legal basis that would compel the Court to grant them the relief they seek, a remaining issue is whether the Court should admit Giannini to the Central District bar despite his failure to pass the California bar exam.

Under Local Rule 2.2.1, admission to the Central District bar is limited to "active members in good standing of the State Bar of California." Local rules have the force and effect of law as long as they are not inconsistent with statutes or the Federal Rules of Civil Procedure. 28 U.S.C. § 2071; Fed. R. Civ. P. 83. However, the Court has the inherent power to depart from the local rules. Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial § 12:8:1 (1991) (citing *Somlyo v. J. LuRob Enterprises, Inc.*, 932 F.2d 1043, 1049 (2d Cir. 1991)). It is up to the Court to decide whether fairness demands departure from the local rules. *Somlyo*, 932 F.2d at 1049.

In the present case, there is no evident reason to waive Local Rule 2.2.1 and grant Plaintiffs' motion to admit Giannini to the Central District Bar.

D. Rule 11 Sanctions

In the State Bar Defendants' motion to dismiss, they request Rule 11 sanctions against Giannini. Rule 11 provides:

> A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 11.

In the present case, Giannini has filed two suits similar to this suit in the past, raising many of the legal issues raised in the present suit. In the moving papers in the present suit, Giannini repeatedly ignores or refuses to

acknowledge the relevance of the holdings in the previous cases to his present suit. Thus, Rule 11 sanctions appear appropriate.

Conclusion

For the reasons cited above, the Court hereby GRANTS Defendants' motions to dismiss and DENIES Plaintiffs' motion to admit. As ordered on November 2, 1992, Joseph R. Giannini, Esq., must show cause on or before November 23, 1992, why he should not be subject to Rule 11 sanctions. The hearing on said O.S.C. is hereby set upon the Court's calendar on December 14, 1992, at 1:30 PM.

IT IS SO ORDERED.

Dated: Nov. 16, 1992

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

U.S. Const., Art. 4.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

* * *

U.S. Const. Art. Sec. 8

SECTION 8. The congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

U.S. Const.

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OR REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

28 U.S.C.

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * *

42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * *

RULE 983. COUNSEL PRO HAC VICE

(a) (Eligibility) A person who is not a member of the State Bar of California but who is a member in good standing and eligible to practice before the bar of any United States Court or the highest court of any state, territory or insular peninsula of the United States and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel pro hac vice, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel pro hac vice pursuant to this rule if (1) He is a resident of the State of California, or (2) He is regularly employed in the State of California, or (3) He is regularly engaged in substantial business, professional, or other activities in the State of California. Absent special circumstances, repeated appearances by any person pursuant to this rule shall be cause for denial of an application. (Adopted effective Sept. 13, 1972.)

(b) (Application; Notice of Hearing.) A person desiring to appear as counsel pro hac vice in a superior, municipal, or justice court shall file with the court a verified application together with proof of service by mail in accordance with 1013a of the Code of Civil Procedure of a copy of the application and of the notice of hearing of the application upon all parties who have

appeared in the cause and upon the State Bar of California at its San Francisco office. The notice of hearing shall be given at the time prescribed in section 1005 of the Code of Civil Procedure unless the court has prescribed a shorter period.

An application to appear as counsel pro hac vice in the Supreme Court or a Court of Appeal shall be made as proved in rule 41, with proof of service upon all parties who have appeared in the cause and upon the State Bar of California at its San Francisco office.

The application shall state:

(1) the applicant's residence and office address;

(2) the courts to which the applicant has been admitted to practice and the dates of admission;

(3) that the applicant is a member in good standing in those courts;

(4) that the applicant is not currently suspended or disbarred in any court;

(5) the title of court and cause in which the applicant has filed an application to appear as counsel pro hac vice in this state in the preceding two years, the date of each application, and whether or not it was granted; and

(6) the name, address, and telephone number of the active member of the State Bar of California who is attorney or record. (As amended effective March 15, 1991; previously amended by the Supreme Court effective Sept. 13, 1972, October 3, 1973, Sept. 3, 1986, and Jan. 17, 1991.)

(c) (Fee) An applicant for permission to appear as counsel pro hac vice pursuant to this rule shall pay a reasonable fee not exceeding $50 to the State Bar of California with the copy of the application and the notice of hearing that is served upon the State Bar. The amount of the fee shall be fixed by the Board of Governors of the State Bar of California (1) to defray the expenses of administering the provisions of this rule which are applicable to the State Bar and the incidental consequences resulting from such consequences, and (2) partially to defray the expenses of administering the board's other responsibilities to enforce the provisions of the State Bar Act relating to the competent delivery of legal services and the incidental consequences resulting therefrom. (Adopted effective Sept. 3, 1986.)

(d) (Contempt and Other Court Sanction; Discipline) A person permitted to appear as counsel pro hac vice pursuant to this rule shall be subject to the jurisdiction of the courts of this state with respect to the law of the state governing the conduct of attorneys to the same extent as a member of the State Bar of California. He shall familiarize himself and comply with the standards of professional conduct required of members of the State Bar of California and shall be subject to the disciplinary jurisdiction of the State Bar with respect to any of his acts occurring in the course of such appearance. Article 5, Chapter 4. Division 111 of the California Business and Professions Code and the Rules of Procedure of the State Bar shall govern in any investigation or proceeding conducted by the State Bar under this rule. (As relettered effective Sept. 3, 1986; adopted effective Sept. 13, 1972.)

(e) This rule does not preclude the Supreme Court or Court of Appeal from permitting argument in a particular case from a person who is not a member of the State Bar, but who possessions [sic] special expertise in the particular field affected by the proceeding. (As relettered effective Sept. 3, 1986; adopted effective Sept. 13, 1972.)

* The Supreme Court adopts rule 983 under its power to regulate the practice of law.

* * *

GIANNINI V. REAL

APPELLANT'S OPENING BRIEF
IN THE U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRAYER FOR RELIEF

18. RELIEF REQUESTED.

In view of the foregoing, appellant requests the Ninth Circuit to order and declare the following:

1. Enter a finding of fact that appellant is qualified and order appellant's admission to the California Supreme Court and to the United States District Court for the Eastern, Southern and Central Districts of Southern California;

2. Declare as unconstitutional the Committee's requirement that all sister-state attorneys must pass a general bar examination;

3. Declare as unconstitutional the Committee's procedure for giving licensed attorneys a performance test;

4. Declare as unconstitutional the Committee's failure to have an appeal procedure wherein sister-state attorneys denied certification can have a full and fair

hearing by a neutral arbitrator prior to appeal to the California Supreme Court;

5. Declare as unconstitutional the Committee's policy of not having an admission on motion provision for qualified and experienced attorneys who desire to practice substantially full time in California;

6. Declare as unconstitutional the local admission rules of the United States District Court for the Central, Southern and Eastern Districts of California;

7. Declare as unconstitutional the Central, Southern and Eastern Districts' failure to have an admission on Motion provision for qualified and experienced sister-state attorneys;

8. Declare that the individual Committee members have been validly served and enter default against these members;

9. Declare the evidence as a matter of law evidences appellant is entitled to summary judgment and the Committee and its members are not entitled to qualified immunity;

10. Award appellant attorneys fees and costs;

11. Sanction Truitt Ritchey and Diane Yu for perjury committed in the United States Court of Appeals for the Ninth Circuit;

12. Remand the case to the Central District Court for a determination of damages.

Dated: November 7, 1989

Respectfully submitted,

BY: /s/ Joseph R. Giannini 11/7/89
JOSEPH R. GIANNINI
Appellant, In Pro Per

GIANNINI V. REAL

COMPLAINT IN THE DISTRICT COURT

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

1. An order admitting plaintiff to the Bar of the California Supreme Court;

2. An order admitting plaintiff to the Bars of the Central, Southern and Eastern District Courts of California;

3. An order declaring the performance test given to attorneys to be unconstitutional;

4. An order declaring that licensed sister state attorneys who have been licensed under equivalent standards, who move to California and desire to work full time in California, do not have to re-take a general bar examination;

5. An order requiring the Committee to certify for admission any attorney who had been deprived of California admission because of failing scores on the performance test from July 1985 to the present;

6. An order requiring the Committee of Bar Examiners to refund all bar examination fees of any failed attorney from July 1985 to the present;

7. An order declaring the Central, Southern, and Eastern Districts of California's admission prerequisite of California licensure unlawful;

8. Award plaintiff compensatory damages in the amount of $1,000,000; and,

9. Award plaintiff attorneys fees and costs of suit.

DATED: October 21, 1988

/s/ Joseph R. Giannini
JOSEPH R. GIANNINI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 87-03797

JOSEPH R. GIANNINI,
Appellant,
v.
THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, et al.,
Appellees.

The undersigned, counsel of record for appellees THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, et al., certifies that there are no known interested parties other than those participating in the above-entitled case, nor are there any related cases pending in this Court.

Dated: December 22, 1987

/s/ Truitt A. Richey, Jr.
Truitt A. Richey, Jr.

AMENDED COMPLAINT IN THE DISTRICT COURT

PRAYER FOR RELIEF

WHEREFORE the Plaintiffs pray for the following relief:

1. An order declaring that California Rule of Court 983 is unconstitutional under the Privileges and Immunities Clause;

2. An order declaring that California Rule of Court 983 is unconstitutional under the Commerce Clause;

3. An order declaring California Rule of Court 983 has interfered with MORISSETTE and ROSENTHAL's constitutional right to petition the court for redress their grievances, association, and right to counsel;

4. An order admitting Plaintiff JOSEPH R. GIANNINI to the bar of the United States District Court for the Central District of California;

5. An order admitting Plaintiff JOSEPH R. GIANNINI to the bar of the California Supreme Court;

6. An order declaring the defendants have violated Plaintiff JOSEPH R. GIANNINI, Esq.'s constitutional rights;

7. Such other relief as the Court may deem appropriate;

8. Costs of suit;

9. Attorney fees under 42 U.S.C. 1983, and California State Law.

DATED: December 22, 1992.

/s/ Gerard A. Fierro
GERARD A. FIERRO, ESQ.
Attorney for Plaintiffs
MORISSETTE AND
ROSENTHAL

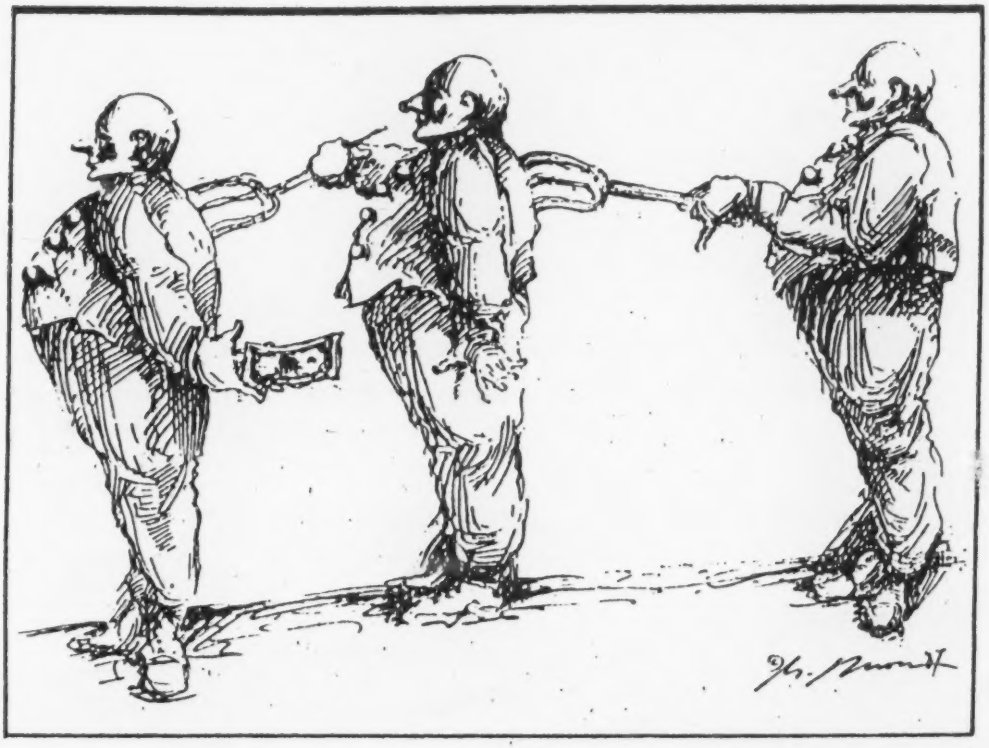
/s/ Joseph R. Giannini
JOSEPH R. GIANNINI, ESQ.
IN PRO PER

The Los Angeles Daily Journal Tuesday, July 3, 1990

Page 4

The Local-Lawyer Protection Racket

So Far, California Has Managed to Keep Out-of-State Attorneys at Bay, But Across the Nation Barriers to Mobility Are Steadily Crumbling



Joseph Giannini, a graduate of Temple University Law School, is a member of the state bars of Pennsylvania and New Jersey and has been admitted to practice before the U.S. District Court for the Northern District of California, the Ninth U.S. Circuit Court of Appeals and the U.S. Tax Court. Currently based in Marina del Rey, he has filed a lawsuit in pro se challenging the constitutionality of California's out-of-state admission procedures and the validity of the local admission rules of the U.S. district courts for the Eastern, Central and Southern Districts of California.

By JOSEPH GIANNINI

The California state and federal out-of-state attorney admission rules serve two functions neither of which is legitimate. The rules provide unlawful economic protection from professional competition for members of the local bar. And, California attorneys, as a result of the State Bar's campaign to publicize the difficulty of its exam, mistakenly believe that their license to practice law in California means they are inherently superior attorneys.

This leitmotif of inherent superiority of one group over another finally has been put to rest in American jurisprudence concerning blacks and women. Nevertheless, out-of-state attorneys in California are still treated as second-class citizens as a result of the discretionary admission policies of the California Committee of Bar Examiners and the local admission rules of the U.S. district courts in Los Angeles, San Diego, and Sacramento, which arbitrarily bar general admission to all non-California-licensed attorneys.

The state Supreme Court and the state Legislature have jointly delegated "broad discretion" to the Committee of Bar Examiners to adopt admission policies and testing procedures for licensing out-of-state attorneys. But giving that panel "broad discretion" is akin to leaving a wolf in charge of a hen house. The members of the committee, after all, are politically appointed non-compensated attorneys in private practice who clearly have a self-serving economic interest in avoiding competition from out-of-state attorneys.

For Californians wanting to become lawyers, the standards for entry into the profession are not nearly as stringent as many believe. California is one of the few remaining states in the union that permits graduates from law schools not accredited by the ABA to become lawyers. The pass rate for these graduates is regularly 50 percent below that of graduates of ABA-accredited law schools, a fact that largely accounts for the seemingly low overall pass rate. Indeed, the pass rate for graduates of ABA-accredited schools in California is right in line with the pass rate in other states. Nevertheless, because of the nature of the exam they are forced to take, experienced attorneys from other states have had a pass rate in California that historically has been similar to the pass rate of non-ABA-accredited graduates.

Hopefully, the 9th U.S. Circuit Court of Appeals will eliminate this discrimination against out-of-state attorneys. Two cases are currently pending before the 9th Circuit challenging the constitutionality of the California out-of-state attorney admission rules, *Giannini v. Real*, 89-55466, and *Maynard v. United States District Court*, 89-55741. The decisions in these related appeals, one of

which I have filed, could have a far reaching effect on the practice of law, the interstate mobility of attorneys and the constitutional right of American citizens to be represented by out-of-state counsel.

Many members of the bench and bar are unaware of the line of recent U.S. Supreme Court decisions that has consistently knocked down barriers to out-of-state attorneys in other states. In the seminal case, *New Hampshire v. Piper*, 470 U.S. 273 (1985), the U.S. Supreme Court established a doctrinal change that has significantly undercut prior case law concerning out-of-state attorney licensing.

The plaintiff in that case, Kathryn Piper, had passed the New Hampshire Bar but was refused admission because she lived 200 yards outside the state's boundaries and refused to set up an office or residence inside the state. She filed a suit to overturn the New Hampshire Supreme Court's licensing rules, and a district court ruled in her favor. An en banc panel of the 2nd Circuit affirmed the lower court.

In its ruling, the Supreme Court rejected the traditional arguments proffered by the state – including the contentions that New Hampshire lawyers are more competent, more familiar with local law, and more ethical than out-of-state attorneys. "There is no reason to believe that a non-resident lawyer will conduct his practice in a dishonest manner," the court concluded. "Nor may we assume that a nonresident lawyer – any more than a resident lawyer – would disserve his client's needs by failing to familiarize himself with the rules."

More importantly, the court in *Piper* specifically held that "the right to practice law is a privilege protected by

the Privileges and Immunities Clause. The court supported this holding by concluding quite correctly that out-of-state attorneys may be the only means available to raise unpopular claims and vindicate federal rights. Recalling the statement of a former president of the ABA, the court observed "that many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition. This reason is not 'substantial'. The Privileges and Immunities Clause was designed primarily to prevent economic protectionism."

The purpose of the clause is to allow citizens of state A to do business in state B under conditions of substantial equality. Any state that tips the balance against nonresidents bears the burden of proving that the regulation advances a substantial state interest is closely related to the objective, and is the least restrictive means of achieving the result.

Few state regulatory schemes that discriminate against out-of-state attorneys have met that burden in the years since the *Piper* decision was handed down. In 1987, for example, the Supreme Court, in *Frazier v. Heebe,* 107 S.Ct. 2607 (1987), invalidated a Louisiana U.S. district court local admission rule that required a Louisiana licensed attorney to have either an office or residence within the state. The court recognized that discrimination in the federal context is difficult to justify, as there is a growing body of specialized federal law and a mobile federal bar, coupled with an increased demand for specialized legal services regardless of state boundaries.

In its next term, in *Supreme Court of Virginia v. Friedman*, 108 S.Ct. 2260 (1988), the court held that an out-of-state licensed attorney had a substantial stake in practicing law and the state had burdened that right by denying her the benefit of a discretionary admission-on-motion provision. The direction of the court's thinking, and a harbinger of how it might rule in the future, is illustrated by the comment of Justice William Rehnquist, joined in dissent by Justice Antonin Scalia: "The court's ruling penalizes Virginia, which at least has gone part way towards accommodating the present mobility of our population, but of course leaves untouched the rules of those states which allow no reciprocal admission on motion."

Last year, in *Barnard v. Thorstenn*, 109 S.Ct. 1294 (1989), the court invalidated a Virgin Islands local residence requirement for bar admissions, observing that a state or territory "may not solve the problem of congested court dockets by discriminating against nonresidents." The *Barnard* court also squarely rejected the argument that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership.

These high court rulings establish a clear trend favoring interstate mobility and opposing legal protectionism. The lawsuit I have filed, *Giannini v. Real*, is right in line with this trend.

In the suit, I argue that the California Committee of Bar Examiners, acting under color of state law, has abused its discretion by requiring all out-of-state licensed attorneys to retake California's general bar examination. I allege that the state does not have a "substantial" interest

in complete retesting of all out-of-state licensed attorneys on general principles of law because we live in an age of specialization and there is an increased need and demand for specialized legal services regardless of state boundaries. Furthermore, certified public accountants and many other professionals receive waivers in California without a requirement of complete retesting.

I further argue that the exam given to out-of-state attorneys is not "closely related" to any legitimate governmental objective. The tests are shallow and designed to elicit pre-selected law student answers. Moreover, attorneys are not given credit for specialized knowledge and experience demonstrated in their answers. The exam is graded in assembly-line fashion by moonlighting attorneys whose opinions of answers are highly subjective and unreliable. Controlled experimental studies have shown that when an exam grader regrades the same answer several days later, 25 percent of the time the grader will be unable to ascertain whether the answer was given a passing or failing grade the first time around.

The inescapable conclusion is that two out of three experienced attorneys have failed the July exam in seven recent years in a row simply because the committee members have erected a fence against out-of-state attorneys to serve their own economic interests.

I further argue that there are "less restrictive means" available. Twenty-five states have admission-on-motion provisions. The Northern District of California, a substantial number of other district courts, the federal appellate courts, and the U.S. Supreme Court, generally admit all out-of-state licensed attorneys.

Federal rules, substantive law, and evidence are the same throughout the United States. There is no legal or factual basis for concluding that attorneys licensed in other states are any less ethical, competent, or knowledgeable about federal law and practice than California licensed attorneys.

The time has come for the California courts to stop providing economic protection for the local bar. The legal profession will benefit when attorneys can move freely from state to state. The American system of justice will benefit by increased attorney access to justice. America has a history of encouraging business competition, and attorneys should not be treated differently.